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IN THE

Supreme Court of the United States

MICHIGAN PEAT, A DIVISION OF BAY-HOUSTON TOWING COMPANY, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), this Court held that government actors must obey their own controlling procedural rules. In this case, the Environmental Protection Agency derailed Michigan Peat's pending appeal of a State's permit decision rendered under a federally-approved Clean Water Act permit program, directing that Michigan Peat begin the permit process anew before the Army Corps of Engineers. EPA took that action without regard to, or authority under, the controlling federal regulations, which specify when and how the agency may participate in a State-run, federally approved Clean Water Act permitting process.

The question presented is whether the Sixth Circuit—in conflict with decisions of this Court and of its sister circuits—erred in allowing the agency to ignore its controlling procedural regulations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Michigan Peat was the plaintiff and appellant below. Michigan Peat is a division of Bay-Houston Towing Company, Inc., a Texas corporation. No publicly held company owns ten percent or more of Michigan Peat's stock. Bay-Houston Towing Company, Inc., has no parent companies, and no publicly held company owns ten percent or more of Bay-Houston Towing Company, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	14
I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENT HOLDING THAT GOVERNMENT AGENCIES MUST STRICTLY FOLLOW THEIR PROCEDURAL RULES	14
II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL	20
III. THE QUESTION PRESENTED IS OF NATIONAL SCOPE AND IMPORTANCE.	24
CONCLUSION	26

TABLE OF CONTENTS—Continued

Page

APPENDICES

Appendix A: Opinion of the United States Court of Appeals for the Sixth Circuit (September 18, 2001)..... 1a

Appendix B: Memorandum and Judgment of the United States District Court for the Eastern District of Michigan (January 12, 2001)..... 2a

Appendix C: Memorandum and Order of the United States District Court for the Eastern District of Michigan (January 24, 2000)..... 10a

Appendix D: Opinion of the United States Court of Appeals for the Sixth Circuit (April 28, 1999)..... 20a

Appendix E: Order of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing or rehearing en banc (November 16, 2001)..... 33a

Appendix F: Order by Circuit Justice Stevens extending time to file petition for certiorari (February 7, 2002)..... 35a

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona Grocery Co. v. *Atchison T.&S.F. Ry.*, 284 U.S. 370 (1932)	15
Board of Curators of Univ. of Mo. v. *Horowitz*, 435 U.S. 78 (1978)	20
Bragg v. *West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002)	24
Bridges v. *Wixon*, 326 U.S. 135 (1945)	15
Carnation Co. v. *Secretary of Labor*, 641 F.2d 801 (9th Cir. 1981)	20
Chevron Oil Co. v. *Andrus*, 588 F.2d 1383 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979)	20
Clarry v. *United States*, 85 F.3d 1041 (2d Cir. 1996)	20
Dolan v. *City of Tigard*, 512 U.S. 374 (1994)	8
Edwards v. *Califano*, 619 F.2d 865 (10th Cir. 1980)	22
Exportal LTDA v. *United States*, 902 F.2d 45 (D.C. Cir. 1990)	22
Friends of Crystal River v. *EPA*, 35 F.3d 1073 (6th Cir. 1994)	4, 17
Haitian Refugee Center v. *Smith*, 676 F.2d 1023 (5th Cir. 1982)	21
Hammond v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968)	21
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	24
In Re: General Motors Corp., C.W.A.-A-0-011-93, 1997 WL 790184 (EPA 1997), *pet. for rev. denied*, 168 F.3d 1377 (D.C. Cir. 1999)	23

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Jideonwo v. *INS*, 224 F.3d 692 (7th Cir. 2000)	20
Lojeski v. *Boandl*, 788 F.2d 196 (3d Cir. 1986)	20
Marshal v. *Lansing*, 839 F.2d 933 (3d Cir. 1988)	21
Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999)	18
Morton v. *Ruiz*, 415 U.S. 199 (1974)	16, 17
Navia-Duran v. *INS*, 568 F.2d 803 (1st Cir. 1977)	20, 21
New York v. *United States*, 505 U.S. 144 (1992)	24
Palazzolo v. *Rhode Island*, 121 S. Ct. 2448 (2001)	18
Public Interest Research Group of N. J., Inc. v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)	22, 23
Service v. *Dulles*, 354 U.S. 363 (1957)	15, 16, 21
Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)	4, 25
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	*passim*
United States ex rel. Bilokumsky v. *Tod*, 263 U.S. 149 (1923)	15
United States v. *Heffner*, 420 F.2d 809 (4th Cir. 1969)	20
United States v. *Lockyer*, 448 F.2d 417 (10th Cir. 1971)	20
United States v. *Morgan*, 193 F.3d 252 (4th Cir. 1999)	21

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Virgin Atlantic Airways, Ltd. v. *National Mediation Bd.*, 956 F.2d 1245 (2d Cir.), *cert. denied*, 506 U.S. 816 (1992)	20
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	15, 16, 21
Yellin v. *United States*, 374 U.S. 109 (1963)	15, 16, 19
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const. amend. V	2
16 U.S.C. § 3101 *et seq.*	24
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
29 U.S.C. § 651 *et seq.*	24
30 U.S.C. § 1201 *et seq.*	24
33 U.S.C. § 1251 *et seq.*	3, 24
33 U.S.C. § 1251(b)	4
33 U.S.C. § 1344(a)	4
33 U.S.C. § 1344(j)	4, 5
42 U.S.C. § 6901 *et seq.*	24
Mich. Comp. Laws § 24.201 *et seq.*	5, 19
Mich. Comp. Laws § 24.271	5
Mich. Comp. Laws § 24.303	5
Mich. Comp. Laws § 324.30301 *et seq.*	5
Mich. Comp. Laws § 324.30319	5
Mich. Comp. Laws § 324.30323	6
Mich. Comp. Laws § 324.99903	7

TABLE OF AUTHORITIES—Continued

	Page
REGULATIONS:	
33 C.F.R. § 328.3(b)	4
40 C.F.R. §§ 233.10	6
40 C.F.R. §§ 233.11	6
40 C.F.R. § 233.32	7
40 C.F.R. § 233.36	10, 18
40 C.F.R. § 233.50(d)	17
40 C.F.R. § 233.50(e)	5, 25
40 C.F.R. § 233.50(g)	5, 25
40 C.F.R. § 233.50(h)	5, 25
40 C.F.R. § 233.50(i)	5, 25
40 C.F.R. § 233.50(j)	5, 17, 25
40 C.F.R. § 233.53(b)	18
40 C.F.R. § 233.53(c)	18
40 C.F.R. § 233.70	4, 5, 9, 19
40 C.F.R. § 233.71	4
OTHER AUTHORITIES:	
Michigan Conservation Commission, State of Michigan, Mem. to Director from Charles E. Miller and H.D. Ruhl regarding Land Exchange No. 29123 (January 20, 1958)	6-7

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PETITION FOR A WRIT OF CERTIORARI

Michigan Peat respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The September 18, 2001, opinion of the Court of Appeals for the Sixth Circuit is unreported and reproduced in the appendix hereto ("App.") at 1a. The January 12, 2001, Memorandum and Judgment of the District Court are unre-

ported and reproduced at App. 3a and 7a respectively. The January 24, 2000, Memorandum and Order of the District Court is unreported and reproduced at App. 10a. The April 28, 1999, decision of the Sixth Circuit is reported at 175 F.3d 422 and reproduced at App. 20a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 2001. App. 1a. On November 28, 2001, that court denied a timely filed petition for rehearing or rehearing en banc. App. 33a. On February 5, 2002, Justice Stevens entered an order extending the time within which to file this petition to and including March 18, 2002. App. 35a. The jurisdiction of the Sixth Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

The State of Michigan administers a federally-approved Clean Water Act permit program, over which the Environmental Protection Agency retains limited oversight authority. Petitioner Michigan Peat applied to the State for a Clean Water Act wetlands permit to harvest peat. After seeking EPA's comments and revising a draft permit to the agency's satisfaction, Michigan issued a final permit to Michigan Peat. The final permit contained several onerous conditions to which Michigan Peat objected. Michigan Peat accordingly appealed the conditions and filed a takings claim against the State, as Michigan's statutes—which were expressly incorpo-

rated into the State's Clean Water Act permitting process—allowed.

EPA's role in the state-administered permitting process was complete when it approved the final permit. But while Michigan Peat's administrative appeal and takings claim were pending, EPA purported to return Michigan Peat's permit application to federal control and required the company to start the Section 404 application process all over again. EPA's action was prohibited by its controlling regulations, which specify when and to what extent the agency may participate in the Clean Water Act permitting process.

The Sixth Circuit below rejected Michigan Peat's claims that EPA's action denied the company the process to which it was entitled under the Clean Water Act's implementing regulations. The decision of the court of appeals conflicts with this Court's repeated admonition that agencies are bound by, and must scrupulously follow, their own procedural rules. The Sixth Circuit's decision likewise conflicts with a host of decisions from its sister circuits endorsing the same fundamental principle.

The lower court's decision also threatens the balance struck by an increasing number of statutory schemes, in which states are given broad authority to administer federally-approved regulatory programs with strictly delimited oversight by the federal agency. If the Sixth Circuit's decision is allowed to stand, federal agencies may freely reinsert themselves into the States' regulatory activities, in defiance of their controlling regulations.

STATEMENT OF THE CASE

Background.

The Clean Water Act. The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, requires a permit before "dredged or fill materials" may be discharged into the "navigable waters" of

the United States. *Id.* § 1344(a); *see Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). "Navigable waters" include certain wetlands—"swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).[1]

Section 404 of the Clean Water Act authorizes the Secretary of the Army, through the Army Corps of Engineers, to issue permits allowing the release of dredged and fill materials into waterways. *See* 33 U.S.C. § 1344(a). Because Congress intended the Act to "protect the primary responsibilities and rights of States to * * * plan the development and use * * * of land and water resources," 33 U.S.C. § 1251(b), the Act empowers the Environmental Protection Agency (EPA) to authorize unified, State-run Section 404 permit programs. *See Michigan Peat* v. *EPA*, 174 F.3d 422, 424 (6th Cir. 1999) (reprinted at App. D). "In short, the scheme provides 'one-stop shopping' for a wetland permit." *Id.* Michigan—which has operated its Section 404 program since 1984—and New Jersey are the only two States that have received EPA approval of their Section 404 programs. *See* 40 C.F.R. § 233.70 (Michigan); *id.* § 233.71 (New Jersey).

EPA retains "[l]imited * * * oversight authority" over Michigan's Section 404 program. *Friends of Crystal River* v. *EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994). The Director of the State's Department of Environmental Quality must send EPA copies of all Section 404 permit applications the Department receives and must notify the agency of the action the Department intends to take with respect to each application. 33

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[1] *See Solid Waste Agency of N. Cook County*, 531 U.S. at 172-173 (holding that Corps' definition of "navigable waters" as including an intrastate pond used by migratory birds exceeded its authority under the Clean Water Act); *id.* at 176-177 (Stevens, J., dissenting) (observing that majority opinion "invalidates * * * the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each"). Michigan Peat's property is next to a county drainage ditch. The ditch is not navigable.

U.S.C. § 1344(j). EPA has thirty days to notify the State if it intends to comment on the application, and the agency must submit such comments within ninety days. *See id.*; 40 C.F.R. §§ 233.50(d)-(e).

If EPA objects to the proposed permit, the Director may not issue the permit unless the permit is revised to satisfy EPA's objections. 33 U.S.C. § 1344(j); *see* 40 C.F.R. §§ 233.50(h)-(i). Within 90 days of receiving EPA's objections, the Director must either seek a public hearing on the objections, 40 C.F.R. § 233.50(g), issue a permit revised to satisfy the agency's objections, *id.* § 233.50(i), or notify EPA of its intent to deny the permit application. *Id.* If the State revises the permit to EPA's satisfaction, EPA may withdraw its objections and the modified permit may issue as a final permit. *Id.* If, within 90 days, the State Director "*neither* satisfies EPA's objections * * * *nor* denies the permit," the regulations direct that the Secretary of the Army, on behalf of the Corps of Engineers, "shall process the permit application." *Id.* § 233.50(j) (emphases added).

Michigan's federally-approved Section 404 permit program incorporates by reference several State statutes, including Michigan's Administrative Procedure Act ("APA"). *See* 40 C.F.R. § 233.70; Mich. Comp. Laws § 24.201 *et seq.* The APA provides for administrative hearings to contest final permit decisions, *see* Mich. Comp. Laws § 24.271, and for judicial review after exhaustion of administrative remedies. *See id.* § 24.303.

Michigan's Section 404 program also expressly incorporates the Goemaere-Anderson Wetland Protection Act, Mich. Comp. Laws § 324.30301 *et seq.* ("Wetlands Act"). The Wetlands Act provides that "[if] a person is aggrieved by any action or inaction of the department, the person may request a formal hearing on the matter involved" pursuant to the State APA, and that any "determination, action, or inaction by the department following the [administrative] hearing is subject to judicial review." *Id.* § 324.30319. The Wetlands

Act also allows property owners who have been denied permits to file takings claims "in a court of competent jurisdiction." *Id.* § 324.30323. If a court concludes that the permit denial constituted a taking, the court may order the State to compensate the landowner "for the full amount of the lost value" of the property; purchase the property from the landowner for the full market value of the property before the adverse permit action; or modify the terms of the permit to "minimize the detrimental [e]ffect [on] the property's value." *Id.* EPA reviewed and approved the State's administrative and judicial procedures for challenging permit decisions before approving Michigan's Section 404 program. *See* 40 C.F.R. §§ 233.10-233.11.

Michigan Peat's Section 404 Permit Process. Michigan Peat is in the business of harvesting peat—partly decayed plant matter often used as potting soil or garden fertilizer. Peat accumulates only in wetland conditions.[2]

Michigan Peat owns or controls peat reserves on two parcels of land near Minden City in Sanilac County, Michigan—Minden North and Minden South. Michigan Peat has harvested peat from the Minden North site since 1958, when it acquired the property in a land exchange with the State of Michigan Department of Conservation.[3] Michigan Peat's

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[2] In normal soil, bacteria decompose plant matter quickly; waterlogged, anoxic wetland soil is hospitable only to anaerobic bacteria, which break down organic material much more slowly. The organic material that builds up over time in such conditions is peat.

[3] When it transferred the Minden property to Michigan Peat in exchange for property along the Lake Huron shoreline, the State acknowledged that the primary economically beneficial use of the Minden land was for peat harvesting:

> The land * * * has a dense cover of low brush and some acid-tolerant sedges which have a low value for game and receives comparatively little use by hunters * * *. The applicant desires the land for removal of the peat for use in the manufacture of commercial plant mulches and fertilizers. *The main value of the property consists of this special proposed use.* [Michigan

Minden North and Minden South parcels together comprise close to 2,800 acres, but Michigan Peat only harvests peat on 951 acres of Minden North, 749 acres of which the company has cultivated since 1958, and 202 acres of which the company began harvesting around 1980. The Minden sites are located near major rail and highway lines, minimizing the expense of harvesting and bringing peat to market.

In 1991, Michigan Peat filed a Section 404 permit application with the Michigan Department of Natural Resources,[4] to cover its historical operation and to expand its operations to Minden South and portions of Minden North from which peat previously had not been harvested. Under the procedures set forth in Section 404 and its implementing regulations, the Department issued a public notice announcing Michigan Peat's permit application and invited comments on the application. *See* 40 C.F.R. § 233.32. No comments were received; but after the public comment period had expired, the State asked Michigan Peat to put its application on hold and develop an environmental site assessment ("ESA"). Michigan Peat agreed, and for the next two years it performed studies necessary to complete an ESA, including a hydrogeological study of the site, an endangered species assessment, a full topographical survey of the properties, aerial photography of the site, and a study of alternatives to peat harvesting. Michigan Peat reactivated its permit application in 1994.

In September 1994, EPA notified the Department of Natural Resources that it intended to comment on Michigan Peat's

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Conserv. Commission, State of Michigan, Mem. to Director from Charles E. Miller and H.D. Ruhl regarding Land Exchange No. 29123 (January 20, 1958) (emphasis added).]

[4] Before the Department of Environmental Quality was created in 1995, the Department of Natural Resources was the agency vested with authority to review Section 404 permit applications. *See* Mich. Comp. Laws 324.99903.

permit application. EPA, the Army Corps of Engineers, and the United States Fish and Wildlife Service forwarded written comments to the State several months later. Michigan Peat responded to EPA's comments by, among other things, submitting to the State and EPA a plan demonstrating the extent to which previously-harvested acreage could be "reclaimed" as wetlands.

In March 1995, the Department of Natural Resources issued findings of fact on Michigan Peat's application and forwarded them, along with a draft permit, to EPA. EPA formally withdrew its objections, concluding that the Department's permit "effectively addresse[d]" its concerns, Ct. App. J.A. 251, and the Department issued a final permit decision on Michigan Peat's application. The Department's final permit decision consisted of three parts: Part I acknowledged that about 750 acres of the Minden North plat were in use before 1980, and thus that no permit was necessary for continued harvesting on those acres because they were not "under the jurisdiction of the * * * Wetland Protection Act." *Id.* at 45. Part II classified about 200 acres of Minden North as eligible for a so-called "After-the-Fact" permit because the acres had been brought into use after 1980, *id.*; and Part III denied permit authority to harvest peat from the unopened area of Minden North—approximately 1050 acres. Part III also denied a permit to extract peat from the entire and separate Minden South parcel—approximately 820 acres. *Id.*

The "After-the-Fact" permit issued under Part II of the final permit decision contained several conditions unacceptable to Michigan Peat, including a requirement that Michigan Peat waive its right to appeal the permit decision or to challenge the Department's action as an unconstitutional taking, *id.* at 55, and a constitutionally suspect exaction requiring Michigan Peat to place land in a conservation easement as a condition of the permit. *Id.* at 49; *see Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Michigan Peat accord-

ingly petitioned for review of the Department's permit decision under the State's Administrative Procedure Act, as incorporated by reference into Michigan's Section 404 process. *See* 40 C.F.R. § 233.70.

Michigan Peat also challenged Part III of the final permit decision—the complete prohibition against peat harvesting on approximately 1,870 acres of the Minden properties—by filing a regulatory takings claim against the State in the Michigan Court of Claims, seeking damages under the federal and state constitutions and the "takings without compensation" provision of Michigan's federally incorporated Wetlands Act. The case is pending before the Michigan Court of Claims.

In March of 1997, hoping to ward off Michigan Peat's administrative challenge and takings claims, officials from the State's Department of Environmental Quality (DEQ) and EPA jointly prepared a document they characterized as a "Draft Process Outline for Michigan Peat permit proposal." Ct. App. J.A. 236. EPA and DEQ were apparently undeterred by the fact that Michigan Peat had no "permit proposal" or application currently pending with the State; the final permit was on appeal.

DEQ and EPA's "outline" identified several alternative ways in which the State and EPA could respond to Michigan Peat's administrative appeal and takings claims. One of the scenarios EPA and DEQ jointly proposed was for DEQ to "issue[ ] a [second] permit over EPA's objection." Under the scenario described by EPA and DEQ, such an action would force Michigan Peat to "apply to the Corps of Engineers to obtain a federal [Section] 404 permit" and to "go through the full Corps permitting process." *Id.* at 238. The document further noted that "[i]t would take some time to get through the federal permit process (there is no deadline for action on an individual permit of this type), and there is no assurance that a permit would be issued." *Id.* at 238-239. The document also threatened federal enforcement action against

Michigan Peat if the company continued to pursue its takings claim against the State. *Id.* at 238.

In June 1997, with Michigan Peat's administrative appeal still pending and its takings claim against the State on the verge of trial, DEQ took, in concert with EPA, what the Department's Director later acknowledged was a "strategic" action. Although DEQ no longer had an application pending from Michigan Peat—its final permit decision was on administrative appeal—the Department issued what it labeled a "state only permit" for the Minden properties. Ct. App. J.A. 240. DEQ issued the "state only permit" without public notice, a public comment period, or a public hearing, all of which are required before a permit may be modified, suspended, or revoked. *See* 40 C.F.R. § 233.36.

The DEQ's "state only permit" purported to modify the final permit decision rendered two years earlier by allowing Michigan Peat to expand its peat extraction operations into all previously unmined portions of Minden North and Minden South. The document stated, however, that issuance of the permit "DOES NOT AUTHORIZE ANY WORK UNDER THE AUTHORITY OF THE FEDERAL CLEAN WATER ACT. Any work initiated on this project without required § 404 approval may be considered a violation of Federal law." Ct. App. J.A. 240 (capitalization in original).

Right on cue, after DEQ issued its so-called "state-only permit," EPA purported to transfer permit authority under the Clean Water Act to the Army Corps of Engineers. *See* Ct. App. J.A. 249. The Corps required Michigan Peat to start the permit process all over again, without benefit of a ruling from the ongoing administrative proceeding challenging the State's "final" permit. As DEQ and EPA readily conceded, that bait-and-switch was designed to force the company—after seven years of process and while appealing a final permit decision—back to the starting line.

Michigan Peat I. In May of 1997, after Michigan Peat received the joint "outline" suggesting that EPA and DEQ

might force the company to start the Section 404 process again from the beginning—this time with the Army Corps of Engineers—Michigan Peat filed suit against respondents in federal district court. In June, after EPA announced its intent to transfer permit authority to the Corps, Michigan Peat amended its complaint to reflect EPA's action and added the State of Michigan, the DEQ, and the Director of the DEQ as defendants.

Michigan Peat's amended complaint alleged, among other things, that EPA and the State had failed to accord Michigan Peat the process it was due under the applicable Section 404 regulations, when they forced the company to start the Section 404 permit process over again with the Corps solely because Michigan Peat pursued the remedies to which it was entitled under the Section 404 permit process. Michigan Peat stated that EPA's action raised constitutional questions regarding executive agency adherence to its regulations, as well as the constitutional legitimacy of strategic action by a government agency in order to forestall pending administrative and constitutional claims.

The defendants separately moved to dismiss Michigan Peat's claims. The District Court granted the motions, concluding that the State defendants were immune from suit and that the federal defendants had not taken a "final action" subject to challenge in court. *Michigan Peat* v. *Regional Administrator of Region V of the United States EPA*, 7 F. Supp. 2d 896 (E.D. Mich. 1998).

On appeal, the Sixth Circuit reversed the court's dismissal of the federal defendants. With respect to the 1995 final permit—the permit EPA had approved before it issued—the court of appeals held that "the logical conclusion is that the EPA's action was final. *Statutorily, there was nothing left for the EPA to do once it signed off on the proposed permit.*" App. 30a (emphasis added). The Sixth Circuit also recognized that Michigan Peat's decision not to sign the final permit allowed it to preserve its rights; "if Michigan Peat did

sign the permit it would have waived the appellate remedies it is pursuing." *Id.*

Michigan Peat II. On remand from the Sixth Circuit, the District Court again granted judgment for the federal defendants. The District Court first concluded, after briefing on motions for partial summary judgment, that EPA had not acted improperly in transferring permit authority to the Corps of Engineers while Michigan Peat's administrative appeal was pending before the DEQ. App. 16a-17a. The District Court recognized that EPA's action was perplexing, coming as it did years *after* the statutory period had run for commenting on a permit, and with no permit application currently pending before the DEQ. The court observed that back in 1995, the Department had "satisf[ied] the EPA's objections" to the proposed permit within the time period fixed by the regulations; that EPA had subsequently withdrawn its objections to the permit; that DEQ had *issued* a permit; and that DEQ had "only later issued the state-only permit which failed to conform to the EPA's objections." *Id.* at 16a. The court concluded, however, that it could find "*no compelling reason to bar the transfer of authority*" to the Corps—despite the fact that there was no permit application then pending with the DEQ over which authority could be exercised. *Id.* (emphasis added).

The District Court also held that "[t]he fact that the agreement between the EPA and MDEQ includes the provisions of Michigan's Administrative Procedures Act * * * does not mean that the [federal] government is bound by those proceedings." *Id.* The court concluded that while Michigan Peat had the right to appeal the DEQ's permit decision, nothing prevented EPA from nevertheless transferring authority to process the permit to the Corps. *Id.* at 17a. The District Court accordingly granted summary judgment for the federal defendants on Michigan Peat's claim that the federal government had wrongly forced the company to

begin the permit process anew with the Corps of Engineers. *Id.*

Several months later, the District Court issued a decision on Michigan Peat's remaining claims. App. 3a. The court found that Michigan Peat had no right to harvest even the 749 acres of the Minden property it had worked since 1958—the area EPA and DEQ had previously conceded were "grandfathered"—without first obtaining federal approval. App. 5a. According to the District Court, although EPA had withdrawn its objections to the State's 1995 "final permit" containing the grandfathering language, Michigan Peat's failure to sign the permit (which would have forfeited the company's appeal rights) meant that the permit had never become "final" and binding on EPA and DEQ. *Id.*

Michigan Peat appealed. The company challenged the District Court's dismissal of its constitutional claims, again arguing that EPA had violated Michigan Peat's procedural rights under the controlling Section 404 regulations when it short-circuited Michigan Peat's administrative appeal and forced it to begin the permit application process anew. Michigan Peat contended that when the federal government established an administrative process, as it did in approving Michigan's Section 404 program, the government is obligated to abide by that process; curtailing Michigan Peat's administrative procedure midway, as EPA did by transferring authority to the Corps, denied the company the process to which it was entitled.

A panel of the Sixth Circuit affirmed the District Court's decision. App. 1a. Michigan Peat petitioned for rehearing and for rehearing en banc, again arguing that the government was not permitted to thwart the Section 404 regulations, and Michigan Peat's appeal rights under those regulations, by arbitrarily directing that Michigan Peat begin the application process over again with the Corps of Engineers. The Sixth Circuit denied Michigan Peat's petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENT HOLDING THAT GOVERNMENT AGENCIES MUST STRICTLY FOLLOW THEIR PROCEDURAL RULES.

1. Government agencies must obey their controlling procedural rules. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The petitioner in *Accardi*, a deportable alien, had requested that his deportation order be suspended. Regulations governing the procedure for suspending deportation orders required that the Board of Immigration Appeals exercise its discretion in deciding whether to grant suspension. The regulations provided that the Board's decision was final, except in certain instances where the Board was required to refer the request to the Attorney General for final decision—including where the Attorney General directed that the Board refer a request to him. *Id.* Thus, the Attorney General ultimately retained final authority to grant or deny a request to suspend a deportation order, regardless of the Board's decision.

Before the Board considered petitioner Accardi's request, the Attorney General released a list of one hundred "unsavory characters"—including Accardi. *Id.* at 264. This Court observed that the "unsavory characters" list was distributed to the Board with the implicit, but clear, message that those on the list should not have their deportation orders suspended. *Id.* The Court held that petitioner's rights were violated by the Board's failure to exercise its own discretion, as required by the regulations outlining the deportation procedure, and remanded the case for the Board to consider petitioner's application, relying on its own discretion and without reference to the "unsavory characters" list. *Id.* at 268. This Court held that the fact that the Attorney General had final authority over the deportation decision was irrele-

vant: "[petitioner] may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings." *Id.*

Accardi's animating principle can be traced to earlier decisions. In *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923), this Court stated that "[i]t may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." *See also Bridges* v. *Wixon*, 326 U.S. 135, 152-153 (1945) (likewise invalidating a deportation order issued without complying with all procedural rules).

This Court has also made clear that the requirement that agencies adhere to their own regulations applies well beyond immigration matters. *Arizona Grocery Co.* v. *Atchison T.&S.F. Ry.*, 284 U.S. 370 (1932). *Arizona Grocery* involved a challenge to an Interstate Commerce Commission ruling awarding reparations to shippers for paying "unreasonable" rates to carriers. *Id.* at 382. The ICC had determined that the rates charged were unreasonable—even though the carriers had charged less than the maximum allowable rate under the ICC's rules. *Id.* at 382-383. This Court held that the carriers were entitled to rely upon the Commission's rules regarding the maximum allowable rates, and that if carriers charged rates in compliance with the rules, the Commission could not later ignore its rules and conclude that the rates were "unreasonable." *Id.* at 389.

This Court repeatedly, and in a variety of contexts, has confirmed *Accardi*'s central holding. When an agency failed to follow applicable procedural rules, this Court has directed that dismissed employees be reinstated, *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), *Service* v. *Dulles*, 354 U.S. 363 (1957); overturned a conviction for contempt of Congress, *Yellin* v. *United States*, 374 U.S. 109 (1963); and invalidated benefits

restrictions promulgated by the Bureau of Indian Affairs, *Morton* v. *Ruiz*, 415 U.S. 199 (1974).

In *Service*, the Secretary of State had absolute statutory discretion to dismiss any Foreign Service officer whenever the Secretary concluded it was in the interests of the United States to do so. 354 U.S. at 370. But the Secretary had promulgated procedures that allowed him to dismiss a Foreign Service officer *only* after a reviewing board had taken "unfavorable action" toward the employee and a deputy undersecretary had approved the board's action. *Id.* at 374-375. When the Secretary of State dismissed a Foreign Service employee without complying with the procedures that had been put in place, this Court reversed. The Court noted that while "the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, * * * having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." *Id.* at 388. *See also Vitarelli*, 359 U.S. at 546 (reinstating federal employee who had been dismissed without being provided procedural protections afforded by department regulations).

The petitioner in *Yellin* was convicted of contempt of Congress for refusing to answer questions in a public hearing before a subcommittee of the House Committee on Un-American Activities. 374 U.S. at 111. The Committee's rules required that the Committee consider requests for questioning to be held in a private executive session and that the Committee weigh, among other things, possible damage to the witness's reputation caused by a public hearing. *Id.* at 115-116. The petitioner had requested that his questioning take place in a private executive session; but the Committee's staff director, without adhering to the rules, had denied the request. *Id.* at 112. The Supreme Court found that the Committee's action was at variance with its rules and that like executive agencies, legislative committees must be "held to observance of [their] rules." *Id.* at 114. The Court ac-

cordingly overturned petitioner's contempt conviction; it recognized that although the Committee might well deny the petitioner's request for a private hearing, he was "at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted." *Id.* at 121.

In *Morton*, the Supreme Court struck down an unpublished directive promulgated by the Bureau of Indian Affairs declaring that only Indians living on reservations were entitled to certain federal benefits. 415 U.S. at 231. The Bureau's internal procedures manual required that the BIA publish all directives informing the public of benefits eligibility requirements. *See id.* at 235. While the Court recognized that the Bureau ultimately had authority to limit the class of Indians entitled to benefits, the Court held that before those limitations could take effect, the BIA "must comply * * * with its own internal procedures" and publish its eligibility directives. *Id.*

2. EPA's action in this case, and the decision of the Sixth Circuit condoning it, cannot be reconciled with the *Accardi* line of decisions. The regulations governing the Section 404 process require that EPA submit objections to a permit application within ninety days of receiving notice from the administering State of a pending application. 40 C.F.R. §§ 233.50(d)-(e). The regulations further provide that the State must, within ninety days after receiving objections or comments from EPA, revise the permit to satisfy EPA's objections or deny the permit. The transfer of permit authority over a pending application to the Corps of Engineers occurs by operation of law, and only when the State Director "*neither* satisfies EPA's objections * * * *nor* denies the permit." 40 C.F.R. § 233.50(j) (emphasis added); *see Friends of Crystal River*, 35 F.3d at 1079-80. Once a final permit has issued with EPA's approval, EPA has no further authority

over the process, and the detailed Section 404 regulations do not provide for any further involvement by the agency.[5]

EPA ignored the strictures of its governing regulations in this case. After EPA submitted comments to the State, Michigan's Director took the agency's comments into account and changed the proposed permit to satisfy EPA's objections. EPA at that point formally withdrew its objections, *see* Ct. App. J.A. 251, and Michigan issued a *final* Section 404 permit. At that point—and as the Sixth Circuit had earlier recognized in *Michigan Peat I*—EPA had no further role to play; a final permit had issued. *See* App. 30a ("Statutorily, there was nothing left for the EPA to do once it signed off on the proposed permit.").

EPA, however, then created a new role for itself without regard to its governing regulations. While Michigan Peat's administrative appeal and takings action were still pending, *and with no permit application currently before the State*, EPA and the State cooked up a "new" permit—the "state-only" permit. After Michigan issued that phantom permit, EPA promptly arrogated authority over Michigan Peat's Section 404 permit application and commanded the company to file yet another Section 404 application, this time with the Corps. *See* Ct. App. J.A. 132. The agency's machinations scuttled Michigan Peat's administrative appeal and takings action and forced the company to start the Section 404 process all over again.[6]

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[5] The regulations allow EPA to suspend a state program in its entirety, but only after consulting with the State Director, giving public notice, and holding a public hearing. *See* 40 C.F.R. § 233.53(b)-(c). The State and EPA may also modify a final permit decision, but only after giving notice to the permittee and holding a hearing. *See* 40 C.F.R. § 233.36; *supra* at 10. EPA pursued neither option here.

[6] See *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2459 (2001) (noting that "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair * * * procedures in order to avoid a final decision") (citing *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)).

EPA's renegade action took place entirely outside the regulatory process. Michigan Peat no longer had a permit application pending, and the State's final permit decision—which EPA had joined—was subject to the administrative and judicial challenges set forth in the governing statutes and regulations. *See* 40 C.F.R. § 233.70 (noting that Michigan's Administrative Procedures Act, Mich. Comp. Laws § 24.201 *et seq.*, was "part of the approved State-administered program"). As the District Court correctly noted, EPA's regulations dictate when a permit application transfers to the Corps by operation of law—specifically, if the State has not answered EPA's objections within ninety days of receiving them. App. 16a. But the District Court nonetheless concluded that it saw "no compelling reason to bar the transfer of authority beyond this 90 day period." *Id.* The Sixth Circuit summarily stated that it agreed with the District Court's reasoning. App. 1a-2a.

The "compelling reason" the District Court professed not to find exists in the Clean Water Act regulations themselves, and in *Accardi* and its progeny. The District Court and Sixth Circuit completely ignored the protections afforded by the *Accardi* doctrine; as this Court has explained, parties must be able to rely on the reasonable expectation "that the [government] actually does what it purports to do [—] adhere to its own rules." *Yellin*, 374 U.S at 123. The governing Section 404 regulations are quite clear; EPA's role ends when it withdraws objections to a permit and the permit issues. If an applicant appeals a final permit issued by a State with EPA's blessing, EPA presumably may intervene in those proceedings to protect its interests. But it may not, under its regulations and under *Accardi*, short-circuit that process by yanking the permit application from the State proceedings and forcing an applicant to begin anew with the Corps.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

The other courts of appeal are uniformly lined up against the decision of the Sixth Circuit in this case. Indeed, every circuit to have considered the issue *except* the Sixth Circuit in this case has followed *Accardi*'s command that administrative agencies are bound by their own regulations.[7] *See, e.g.*, *United States* v. *Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established.

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[7] The majority view among the courts of appeal is that *Accardi* is founded upon constitutional principles of due process. *See Jideonwo* v. *INS*, 224 F.3d 692, 697 (7th Cir. 2000) (characterizing *Accardi* as a case where the government retroactively changed procedures in violation of due process); *see also Virgin Atlantic Airways, Ltd.* v. *National Mediation Bd.*, 956 F.2d 1245, 1251 (2d Cir.) (*Accardi* based on due process), *cert. denied*, 506 U.S. 816 (1992); *Chevron Oil Co.* v. *Andrus*, 588 F.2d 1383, 1386 (5th Cir.) (same), *cert. denied*, 444 U.S. 879 (1979); *Navia-Duran* v. *INS*, 568 F.2d 803, 809 (1st Cir. 1977) (same); *United States* v. *Lockyer*, 448 F.2d 417, 421 (10th Cir. 1971) (same).

Some circuits have not endorsed the prevailing view. *See Lojeski* v. *Boandl*, 788 F.2d 196, 199 (3d Cir. 1986) (opining that *Accardi* was based on administrative law principles); *Carnation Co.* v. *Secretary of Labor*, 641 F.2d 801, 804 (9th Cir. 1981) (*Accardi* doctrine is not a constitutional doctrine). *See also Clarry* v. *United States*, 85 F.3d 1041, 1047 (2d Cir. 1996) (stating, in contrast to the court's earlier opinion in *Virgin Atlantic*, that "the *Accardi* doctrine is a judicially-evolved rule ensuring fairness in administrative proceedings") (internal quotations omitted). This minority view also has been echoed by this Court in dicta. *See Board of Curators of the Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 92 n.8 (1978) ("[B]oth *Service* and *Accardi* * * * enunciate principles of federal administrative law rather than of constitutional law.").

Whether *Accardi* is constitutionally-based or grounded in administrative law principles, however, is beside the point; under either formulation, EPA's action and the Sixth Circuit's ratification of its action conflict with *Accardi*'s fundamental principle that administrative agencies must strictly adhere to their procedural rules.

When it fails to do so, its action cannot stand and courts will strike it down.") (citing *Accardi*, 347 U.S. 260).

In *Marshal* v. *Lansing*, 839 F.2d 933 (3d Cir. 1988), for example, the court of appeals remanded a case back to the Parole Commission where the Commission had failed to provide reasons for its determination of the defendant's offense severity rating, as the Commission's regulations required. *Id.* at 943. The remand did not change the sentence, but was solely so the Commission could provide specific reasons for its decision. *Id.* Citing *Accardi*, the court of appeals explained that "a prisoner has a right to insure that he is being held in compliance with agency regulations." *Id. See also Hammond* v. *Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) (observing, citing *Service* and *Vitarelli*, that "a validly promulgated regulation binds the government as much as the individuals subject to the regulation; and, this is no less so because the governmental action is essentially discretionary in nature").

In *Navia-Duran* v. *INS*, 568 F.2d 803 (1st Cir. 1977), the court of appeals overturned a deportation decision and remanded the case for a new hearing that would protect the deportee's rights under the regulations. The Fourth Circuit remanded an administrative order permitting medical personnel to forcibly treat a pretrial detainee with anti-psychotic medication for further factfinding to ensure that the decision was made in accordance with controlling federal regulations. *United States* v. *Morgan*, 193 F.3d 252, 267 (4th Cir. 1999).

In *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), the Fifth Circuit invalidated a blanket expedited-deportation procedure that had been applied to aliens from Haiti. Under the procedures provided by INS regulations, when a valid asylum claim was presented, the deportation was suspended while that claim was considered. *Id.* at 1028, 1030. Under the expedited procedure for Haitians, that regulation was not followed. *Id.* at 1030. The court of appeals noted that the fact that the INS pursued the expedited

plan in contravention of its own rules was sufficient in itself to grant relief and require the government to comply with its own procedures. *Id.* at 1041 n.28. And the Tenth Circuit has overturned Social Security Administration benefits decisions that were contrary to its governing regulations. *Edwards* v. *Califano*, 619 F.2d 865, 869 (10th Cir. 1980).

Courts of appeal have adhered to the *Accardi* doctrine even where no fundamental liberty (as in the deportation cases) or property (as in this case, and *Edwards*) interest was at stake. In *Exportal LTDA* v. *United States*, 902 F.2d 45 (D.C. Cir. 1990), a Chilean fruit producer appealed a decision of the Secretary of Agriculture denying the producer's request for a waiver of the bond requirement in a reparation proceeding. Although the Secretary had discretion under the governing statute to grant or deny the bond, controlling Department of Agriculture regulations specified that the bond "shall" be waived if the requester showed that it was the resident of a country where no such bond was required of a United States citizen in a similar proceeding. *Id.* at 49. Noting that "[i]t is axiomatic that an agency must adhere to its own regulations," the court of appeals rejected the Secretary's argument that he retained discretion over the waiver decision despite the language of the regulation and overturned his decision. *Id.* (internal quotation omitted).

This host of appellate court cases, all following the rule laid down in *Accardi*, makes clear that the cure for government action taken without regard to controlling procedural regulations is to vacate the action and require the agency to abide by its procedural rules. Ignoring the path set down in all those cases, the courts below saw "no compelling reason" for EPA to follow its controlling regulations, App. 16a, and allowed the agency to short-circuit the process to which Michigan Peat was entitled.

3. The Sixth Circuit's decision also conflicts with the Third Circuit's treatment of appeals procedures in another comprehensive state/federal permit program. In *Public*

Interest Research Group of New Jersey, Inc. v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), several environmental groups sued a storage facility operator for violating certain conditions of its Clean Water Act permit.[8] The facility operator defended in part by claiming that several requirements in its permit had been inadvertently included and should not be given legal effect. *Id.* at 77. The Third Circuit held that the operator could not collaterally attack the permit's terms; rather, it should have appealed those conditions in the forum set forth by state law and incorporated into the federal permitting program. *See id.* at 78 & n.26.[9]

The Third Circuit thus held that the only avenue for appealing a permit decision in a federal/state Clean Water Act permit program is the state procedure adopted under EPA regulations. But the Sixth Circuit below exempted the opposite party—the government—from the same strictures, essentially holding that the state appeals process is a formality that EPA can nullify at any time simply by transferring permit authority to the Corps. That ruling subjects entities seeking Section 404 permits in Michigan to a classic whipsaw. An applicant must pursue the federally-approved state administrative appeal in order to preserve any objections to final permit. But those procedures offer no promise of relief: at any time, EPA can simply create a new permit process and require the applicant to start the process again. *Accardi*—and the host of cases that followed it—forbid that result. Federal regulations apply evenhandedly; both private parties and the

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[8] The permit at issue was issued not under section 404, but under section 402, which governs National Discharge Elimination System (NPDES) permits. *See* 913 F.2d at 68.

[9] EPA *itself* has said as much about Michigan's appeal procedures. *See In Re: General Motors Corp.*, C.W.A.-A-0-011-93, 1997 WL 790184 (EPA Dec. 24, 1997) (if permit holder wishes to challenge conditions of a permit issued under Michigan's unified permit process, it must pursue appeal according to the state procedures), *pet. for rev. denied*, 168 F.3d 1377 (D.C. Cir. 1999).

government are bound by their terms. The Sixth Circuit's decision conflicts with that fundamental principle.

III. THE QUESTION PRESENTED IS OF NATIONAL SCOPE AND IMPORTANCE.

The Sixth Circuit's decision threatens to undermine the delicate balance of power struck between state governments and the federal government under the Clean Water Act and other similar statutes. Statutes articulating the principle of "cooperative federalism," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981), by which States may submit full-blown regulatory programs for federal approval—essentially sharing authority over federally-run programs—have become increasingly common, particularly in the environmental field. *See New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (noting "numerous federal statutory schemes" of this nature, including the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, and the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 *et seq.*); *see also, e.g., Bragg* v. *West Virginia Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001) (noting "cooperative federalism" of Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 *et seq.*, whereby "responsibility for the regulation of surface coal mining * * * is shared between the U.S. Secretary of the Interior and State regulatory authorities"), *cert. denied*, 122 S. Ct. 920 (2002). The balance struck by these and other statutes is achieved by an understanding that if the States' regulatory and procedural protections pass federal muster, the States may control their own processes, with only limited involvement on the part of the federal agency. *See New York*, 505 U.S. at 167 (observing that "cooperative federalism" arrangements allow States "the choice of regulating * * * activity according to federal standards").

Here, however, the federal agency circumvented the state administrative appeal procedures it had specifically approved and to which it was bound, preferring instead to return Michigan Peat's Section 404 application to its own turf. That was not just a violation of the Section 404 regulations; it was a striking incursion by the federal government into the State's domain. *Cf. Solid Waste Agency of N. Cook County*, 531 U.S at 173 (Court would not endorse agency's interpretation of statute "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power").

In this instance, the incursion came with Michigan's acquiescence, to be sure; but there is no comfort to be taken in that. The lower courts' decisions did not turn on whether the State agreed with EPA or not, and nothing in the decisions limits the federal government's authority to arrogate a formerly state-run process to itself only where the state accedes to the action. After the Sixth Circuit's decision, whenever a federal agency is dissatisfied with either the State's processing of a particular permit application, or the likely outcome of an administrative appeal, the agency can simply take over the reins, even where—as here—controlling regulations limit the agency's involvement in the permitting process. *See* 40 C.F.R. §§ 233.50(g)-(j).

It does not take much imagination to forecast the result of such a capricious system: what incentive would states possess to steer their own programs if the federal government could, at any time, regardless of the procedures set forth in the regulations, step in and seize control of the process? If the Sixth Circuit's decision is allowed to stand, the balance so well-struck in an increasing number of environmental statutes—a balance between uniform administration of federal standards and respect for state prerogatives—will be dramatically altered.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1154

MICHIGAN PEAT,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES OF AMERICA; REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

DECIDED: September 18, 2001

Before MARTIN, Chief Judge; NELSON, Circuit Judge; and RICE, District Judge.*

PER CURIAM. We explained the complicated factual, statutory, and procedural history of this case in *Michigan Peat v. U.S. E.P.A.*, 175 F.3d 422 (6th Cir. 1999) (*Michigan Peat I*). On remand from that decision, the district court

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* The Honorable Walter Herbert Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

granted summary judgment to the Environmental Protection Agency, concluding that the Agency's withdrawal of its objections to the draft permit was not a final and binding determination that 749 acres of wetlands owned by Michigan Peat are exempt from certain provisions of the Clean Water Act. The district court determined that the 749 acres currently are not exempt and that Michigan Peat does not hold a state license to mine peat.[1] We have reviewed the reasoning of the district court and now AFFIRM.

[1] The Environmental Protection Agency also has instituted an enforcement action against Michigan Peat. On February 21, 2001, Michigan Peat filed an emergency motion to this Court requesting a stay in the enforcement action. We denied Michigan Peat's motion, and on May 11, the district court entered an interim order enjoining Michigan Peat from discharging any pollutant until the Army Corps of Engineers issues it a Section 404 permit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-72336-DT

MICHIGAN PEAT, a division of Bay-Houston Towing Co.,

Plaintiff,

v.

REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES OF AMERICA,

Defendants.

January 12, 2001

MEMORANDUM*

HON. AVERN COHN

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* This is a revised statement of the reasons given on the record for dismissing this case. To the extent this statement differs from the record, this statement states the reasons.

The background of the matter before the Court is described in the decision dismissing the case, 7 F. Supp. 2d 896 (E.D. Mich. 1998), the Court of Appeals decision reversing that dismissal, 174 F.3d 422 (6th Cir. 1999), and the Memorandum and Order of January 24, 2000. Parenthetically, the Memorandum and Order is miscaptioned – the state defendants are not parties to the case.

The Court of Appeals decision was a narrow one. Michigan Peat reads too much into it. The Court of Appeals simply said that the sign-off by the Environmental Protection Agency (EPA) on the draft permit was final agency action and that this Court had subject matter jurisdiction. The Court of Appeals did not comment on the merits of the complaint.

Michigan Peat also reads too much into footnote 1 of the Court of Appeals decision, 175 F.3d at 424, when it said,

> In the most simplistic terms, the section 404 program administered by a state "suspends" the federal program because the state's own program is environmentally sound.

The Court of Appeals did not say that the state program supersedes the federal program.

EPA's final agency action was merely to agree to the text of the draft permit. The draft permit, however, was subject to limitations and conditions. If any limitation or condition of the draft permit was changed, there was no longer agreement on the part of EPA. Michigan Peat's refusal to sign the draft permit effectively meant that there was no permit.

Michigan Peat's administrative appeal under Michigan's Administrative Protection Act is an effort to change the limitations and conditions of the draft permit. If Michigan Peat is successful in the administrative appeal, the end result will be a recommendation to the director of Michigan's Department of Environmental Quality (DEQ). If the director accepts any changes recommended through the administrative proceeding, the permit which issued will

contain different limitations and conditions than those to which EPA consented. Effectively, Michigan Peat will not have a valid permit because EPA did not have approve it. The refusal to sign the draft permit vitiated the EPA's consent.

Whether Michigan Peat can "cherry-pick" the draft permit by appealing only certain of its conditions and limitations is irrelevant. EPA made clear in its consent to the draft permit that Michigan Peat could not "cherry-pick" its limitations and conditions.

Further, the grandfathering issue is a red herring. Initially, Michigan Peat did not request a finding that the 749 acres be grandfathered. The "finding" in the March 21, 1995 DEQ letter accompanying the draft permit that the 749 acres was grandfathered was gratuitous. There is no basis in Michigan law for grandfathering any particular parcel of land.

Footnote 3 of page 3 of the DEQ's Prehearing Statement in Contested Case Number 94-08-0342, (the state administrative proceeding), references the 749 acres being grandfathered, and specifically states: "This legal determination by Mr. Zbiciak is incorrect."

The statement by the DEQ that the legal determination of grandfathering was incorrect should have been called to the Court's attention. In any event, the statement is confirmation of the finding that there is no grandfather provision in Michigan law.

Michigan Peat appears to argue that EPA either abdicated its authority to enforce federal law or by delegation agreed that state law would supercede [sic] federal law. To state the proposition answers itself. If, in fact, state law contains a grandfather provision, then the state regulatory program is more limited than the federal program and the agreement to give the state authority to enforce its program in lieu of the federal program was improper because it would mean that there is less regulation under state law than there is under federal law.

Finally, the Court has made two errors for which it accepts responsibility. In dismissing the case, 7 F. Supp. 2d at 898, it said

> The final permit decision specifically acknowledged that the 749 acres of Minden North were mined for peat prior to 1980, and therefore neither the state nor federal government had jurisdiction over them pursuant to § 404 of the CWA.

Including the word "federal" was incorrect.

In the Memorandum And Order of January 24, 2000 at p.6, it said:

> A further proceeding is therefore required to determine whether the parties agreed that the 749 acres were exempt from regulation.

It should have framed the issue as:

> whether the 749 acres were exempt from regulation

There is nothing in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, or in the delegation to the state under section 404(a), 40 C.F.R. § 233.70, to exempt from regulation the 749 acres because Michigan's Wetlands Protection Act, M.C.L. §324.30301 *et seq.*, was enacted subsequent to the date this acreage was first harvested.

An appropriate order and judgment will be separately entered.

/s/
AVERN COHN

Dated: January 12, 2001

Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-72336-DT

MICHIGAN PEAT, a division of Bay-Houston Towing Co.,

Plaintiff,

v.

REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES OF AMERICA,

Defendants.

January 12, 2001

JUDGMENT IN A CIVIL CASE

HON. AVERN COHN

This action came on for hearing before the Court. The issues have been duly heard and briefed. The Court concludes as follows:

1. At no time did the parties reach an agreement that the 749 acres of the Minden Bog, which plaintiff Michigan Peat (Michigan Peat) began harvesting prior

to October 1, 1980, were exempt from regulation regardless of the other issues relating to the permit application. Whether or not there was an agreement is irrelevant. The Clean Water Act (CWA) does not provide for grandfathering specific acres nor does the Michigan Wetlands Protection Act.

2. Nothing in the action by the State of Michigan in offering the March 1995 proposed permit to Michigan Peat, nor the proposed permit itself, served to waive the application of CWA section 404 to Michigan Peat's peat harvesting activities from the time the CWA became effective.

3. Defendant United States Environmental Protection Agency (EPA) is not bound by its conditional withdrawal of objection to the March 1995 proposed permit as a consequence of Michigan Peat's failure [to] sign the draft permit and agree to its conditions and limitations.

4. The Court incorporates by reference the conclusions stated in the January 24, 2000 Memorandum and Order Denying Plaintiff's Motion for Partial Summary Judgment as to Count I and Granting In Part and Denying In Part Defendants' Cross-Motion for Summary Judgment as to Count I. As to the remaining counts in the Complaint (Counts II-VIII), they are restatements of Count I and/or have previously been dismissed.

Therefore, it is ORDERED AND ADJUDGED that plaintiff take nothing and receive no declaratory or other relief; and that final judgment is entered in favor of defendants Regional Administrator of Region V of the

United States Environmental Protection Agency, United States Environmental Protection Agency, and United States of America on the complaint.

/s/
AVERN COHN

Dated: January 12, 2001

Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-72336

MICHIGAN PEAT, a division of Bay-Houston Towing Co., Inc.

Plaintiff,

v.

REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT I AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

HON. AVERN COHN

I. Introduction

Plaintiff, Michigan Peat, a division of Bay-Houston Towing Co., is suing defendants the United States of America, the United States Environmental Protection Agency (EPA), the Regional Administrator of Region V of the EPA (Region V Administrator), the State of Michigan, the Michigan Department of Environmental Quality (MDEQ) and the Director of the MDEQ (Director), seeking declaratory relief. The background of this action is set forth in the Court's prior memorandum and order granting defendants' motion to dismiss on procedural grounds, 7 F.Supp.2d 896 (E.D. Mich. 1998), and the decision of the Court of Appeals for the Sixth Circuit reversing it, 175 F.3d 422 (6th Cir. 1999). Before the Court are cross-motions for summary judgment as to Count I only of the complaint. Bay-Houston seeks a declaration that:

1. The March 1995 § 404 permit decision is final and binding on the federal defendants;

2. The final permit decision determined that 749 acres were opened for peat harvesting prior to 1980 and activity on these acres does not require a § 404 permit; and

3. Michigan Peat has a right to administratively appeal the conditions of the permit issued for an additional 202 acres, and the right to continue operations on the 202 acres pending resolution of its administrative appeal.

The government seeks summary judgment on these same issues, and to the remaining declarations sought by Bay-Houston in Count I that:

1. Bay-Houston's permit process, including its administrative appeal and takings case, complies with § 404;

2. the transfer of permitting authority back to the Army Corp of Engineers (Corp) was illegal; and

3. Michigan Peat's conduct fully complies with the §404 program for the State of Michigan.

For the reasons that follow, Michigan Peat's motion will be denied and defendants' motion will be granted in part and denied in part.

II. Summary Judgment Standard

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [finder of fact] or whether it is so one-sided that one party must prevail as a matter of law." *In re Dollar Corp.*, 25 F.3d 1320, 1323 (6th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In so doing, the Court "must view the evidence in the light most favorable to the non-moving party." *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 101 (6th Cir. 1995).

III. March 1995 Permit Decision

Bay-Houston argues that the § 404 permit the MDNR issued in March 1995 – to which the EPA initially objected and later withdrew its objections – allows it to continue harvesting without a permit. The permit decision grandfathered 749 acres historically mined in Minden North prior to October 1, 1980, and declared them outside the regulation of the Goemaere-Anderson Wetland Protection Act. Bay-Houston appealed the other portions of the permit which allowed an "after-the-fact" permit for 202 acres and disallowed harvesting of other acreage which had never been harvested. Presumably in order to

preserve its right of appeal, Bay-Houston did not sign the permit. Bay-Houston says the decision of the Sixth Circuit settles the question because the court "deemed the March 21, 1995 permit decision a final agency action under § 404."

The Sixth Circuit reversed this Court's decision that Michigan Peat could not challenge the EPA's decision denying it a permit because the EPA had not yet taken a "final agency action" in that it had not filed an enforcement action. *See Crystal River v. United-States Envtl. Protection Agency*, 35 F.3d 1073 (6th Cir. 1994). The Sixth Circuit reversed on the ground that the EPA's decision to withdraw its objections to the 1995 permit was a final decision even though an enforcement action had not been filed. Regarding Michigan Peat's failure to sign the permit, the Sixth Circuit stated: "[w]hile it is true that the 1995 permit specifically stated that it was not final or valid until signed and accepted by the permittee and returned to the MDEQ, the logical conclusion is that the EPA's action was final" because "[s]tatutorily, there was nothing left for the EPA to do once it signed off on the proposed permit." 175 F.3d at 428.

The Sixth Circuit's decision that the EPA had taken final action does not mean that the permit was final. Although the Sixth Circuit held that the EPA's conditional withdrawal of objections was a reviewable final agency action, it made no comparable finding of finality as to the March 1995 permit itself. Although there was nothing left for the EPA to do, there was something left for Michigan Peat to do. Michigan Peat had to sign the permit within the specified time, and therefore to accept its conditions. Administratively appealing the permit did not make it effective. In addition to the EPA's power to object to an MDEQ permit decision, under Michigan law a challenged permit is not deemed final until the outcome of the hearing is determined. MCL § 324.30307. Nothing in the Sixth Circuit's decision suggests otherwise and Bay-Houston has cited no authority for the position that it could accept the permit and operate under it without signing it and while administratively appealing it.

This does not resolve the question of the 749 acres which Bay-Houston argues the EPA determined were simply not subject to regulation and therefore did not require a permit. The government responds that this was part and parcel of the entire permit and Bay-Houston had to accept all of the provisions of the permit or none of them. It points out that under its regulations the acreage would not qualify for grandfathering, 40 Fed. Reg. 31,320, 31,326 (July 25,1975) (codifying 33 CFR § 209.120(e)(2)(iii) (1975)) (because grandfathering extends to discharges completed before specified dates, not to acreage), and that the EPA only agreed to this provision to assure the other conditions of the permit. Specifically, the "after-the-fact" permit required remediation of not only the 202 acres, but the 749 grandfathered acres as well. *See* Condition N. Remediation was the government's principal concern.

The 749 acres raise a triable issue. The cover letter to the permit and the permit itself, allow a finder of fact to conclude that the permit applies only to harvesting the 202 acres. According to the cover letter, the 749 acres did not require a permit because they were grandfathered. Similarly, the remaining unharvested acreage was not included in the permit because it was considered unharvestable. The permit itself – what required signature by Bay-Houston – applied only to the 202 acres. The only signature line appears on the permit; there is no signature line on the cover letter. The permit does discuss reclamation of the 749 acres, but this does not necessarily mean that the grandfather clause is part of the permit; it could simply mean that reclamation of the 749 acres was a condition to harvesting the 202 acres. While the cover letter does discuss that signature of the permit requires the applicant to agree[] to accept and comply with all limitations (conditions) and terms of the permit," this statement refers only to the previous paragraph which concerns only the 202 acres, not the 749 grandfathered acres. This is further made clear by the statement in the preceding paragraph: "Please be advised that failure to accept the permit leaves the company with no authorization to extract peat *within the areas opened since October 1, 1980.*" No

mention is made of the 749 acres harvested prior to October 1, 1980. A further proceeding is therefore required to determine whether the parties agreed that the 749 acres were exempt from regulation regardless of the other issues relating to the permit application.

IV. Settlement Agreement

Bay-Houston also filed a takings action against the State, MDNR, and its director, which is pending in the Michigan Court of Claims. A settlement agreement reached in that action in June 1995 allows Bay-Houston to continue harvesting on the 202 acres during the pendency of the action. In addition to arguing that Bay-Houston is bound by the 1995 permit decision, Bay-Houston argues that the EPA is bound to the MDNR's stipulation to allow interim harvesting on the 202 acres.

The EPA cannot be bound by the settlement agreement reached in the takings action between the State and Michigan Peat. The agreement is a settlement of the takings case to which the EPA is not a party.

Even if the agreement somehow also relates to the administrative appeal, the EPA is still not bound by it. While the state and the EPA are "partners" in the § 404 NPDES program, Bay-Houston cites no authority for its position that the state can bind the EPA in a separate action to which the EPA is not a party. *See United States v. Ford Motor Company*, 814 F.2d 1099 (6th Cir. 1987) (Refusing to bind the EPA to state court judgment in Clean Air Act case where the EPA was not a party to the state action). The "partnership" between the state and the EPA does not obviate the federal government's oversight jurisdiction. The 1977 conference report that accompanied newly-enacted §§ 404(g) through (j) states:

> The conferees wish to emphasize that such a State program is one which is established under State law which functions in lieu of the Federal program. *It is not a delegation of Federal authority.*

H.R. Conf. Report 95-830, at 104 (1977), *reprinted in* 3 *A Legislative History of the Clean Water Act of 1977*, at 288 (Comm. Print 1978) (emphasis added). As discussed by the Court in its prior decision, 7 F.Supp.2d at 897-98, and recognized by the Sixth Circuit in its decision, 175 F.3d at n.1, the § 404 NPDES program does not give all authority to the state.

V. Transfer of Permit Authority to the Army Corps of Engineers

The government seeks summary judgment as to the claim that it improperly transferred § 404 regulatory authority from the MDNR to the Corps when MDNR unilaterally issued a state-only § 404 permit. The Court has previously discussed the § 404 permitting process, including that under § 404(j) of the CWA the authority to issue § 404 permits is transferred from a state back to the Corps as a matter of law wherever a state has failed within the time prescribed by law to amend its proposed permit to conform to objections raised by the EPA. 33 U.S.C. § 1344(j). *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1080 (6th Cir. 1994). While it is true that the State here did satisfy the EPA's objections during the 90 day period as to the March 1995 permit, and only later issued the state-only permit which failed to conform to the EPA's objections, there is no compelling reason to bar the transfer of authority beyond this 90 day period. The state-only permit constituted a second permit decision. In addition, the circumstances here – the State recently suffering a huge verdict against it in a takings case and consequently taking a guarded approach to Bay-Houston's takings action – are unusual. If anything, however, these circumstances demonstrate the reason why Congress provided for continued federal oversight over the § 404 process.

The fact that the agreement between the EPA and MDEQ includes the provisions of Michigan's Administrative Procedures Act (MAPA), MCL § 24.201, *et seq.*, 40 CFR § 233.70(a), does not mean that the government is bound by those proceedings. As discussed, "[t]he Section 404

scheme does not usurp the state's authority to issue a permit under state law." 175 F.3d at 425. Michigan Peat had the right to administratively appeal MDEQ's decision, and MDEQ had the authority to issue a state-only permit. None of this changes the provision under 40 CFR § 233.30 that if the state does not satisfy the EPA's objections or deny the permit, authority to process the § 404 permit is transferred to the Corps. The government is therefore entitled to summary judgment on this claim.

VI. License

Michigan Peat argues that it is operating under a license granted by the State of Michigan by agreement on February 7, 1958 and by warranty deed on June 7, 1962. The MAPA allows a licensee to continue operating during the pendency of an administrative appeal. Michigan Peat argues that the agreement granted it a license and that it has the right to continue to perform under this license during the pendency of its administrative appeal of the '95 permit decision. A license is defined under the MAPA to include "the whole or part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law . . . ." MCL § 24.205(1). "This broad definition under the [MAPA] evidences a legislative intent to include practically any form of permission required by law." *Bois Blanc Island Twp v. NRC*, 158 Mich. App. 239, 242 (1987). In other words, a license is "permission by a competent authority to do an act which, without such permission would be illegal." *Westland Convalescent Center v. Blue Cross & Blue Shield of Michigan*, 414 Mich. 247, 272 (1982).

The agreement and the warranty deed, however, have nothing to do with licensing. Under the 1958 agreement, Michigan Peat was to enter into a land contract with private persons to purchase certain tax reverted lands in Tuscola County, Michigan, and thereafter exchange these lands with the Department of Conservation in exchange for 1,280 acres of wetlands within the Minden Bog. The agreement stated that "[d]uring [the] period" of the land contract, Michigan Peat "shall have the right to remove peat from the said land,

provided such removal shall be limited to an area not to exceed 500 acres" and "to erect buildings, lay roads and rail tracts and dig ditches on the said land." Michigan Peat paid off the land contract and, on June 7, 1962, executed a warranty deed conveying the Tuscola County lands to the MDNR and in turn, received a quitclaim deed conveying Minden North to it. The Minden North deed reserved to the State all mineral rights "provided that muck, peat, and earth shall be excepted from this reservation of minerals . . . ."

This real estate transaction has nothing to do with regulatory agency permitting. The Department of Conservation was a party to a real estate transaction, and bargained for the rights it had in that capacity. Effectively it allowed Michigan Peat to diminish the value of the property during the term of the land contract by mining peat. Once the land contract on the Tuscola County property was paid off, the Department of Conservation gave Michigan Peat a deed in which it reserved its mineral rights and specified that peat was not one of their rights. Peat was dealt with as a resource, not an environmentally regulated object.

Michigan Peat relies on *Bois Blanc Island Twp., supra.* There, several of the plaintiffs obtained land use permits under a predecessor statute to the Solid Waste Management Act, but none were licensed under the current act. The Michigan Court of Appeals held that the land use permits constituted "licenses" under the MAPA. The sanitary landfill permits were in the nature of a land-use permit, permitting the plaintiffs to use state land for a specific purpose, here as a sanitary landfill site.

Bois Blanc Island Twp. does not apply here. The "license" in that case was an agency-issued permit. Here the purported "licenses" are a real estate agreement and a deed. The Department of Conservation did not exercise its regulatory power to issue a permit as it did in *Bois Blanc Island Twp.* The Department of Conservation acted instead as a property owner – it sold property it owned, including the right to deplete a natural resource on the property. Michigan Peat's rights are those of a buyer of property, and any recourse it

may have against the MDNR as a seller is based in property law. The agreement and deed therefore did not allow Michigan Peat to harvest peat without a § 404 permit.

VII. Conclusion

The MDEQ administrative appeal and the state takings actions are remedies Bay-Houston has against the State. If the State was the barrier between Bay-Houston and a § 404 permit, these remedies would settle the matter. Now the principal barrier is the EPA. The EPA has oversight jurisdiction and the EPA has objected to the state-only permit. For the reasons stated, Michigan Peat's motion for partial summary judgment as to Count I is DENIED and defendants' cross-motion is GRANTED IN PART AND DENIED IN PART. The Deputy Clerk will schedule a status conference regarding further proceedings. The fact issue which continues in the case as to Count I is whether the parties agreed that the 749 acres were exempt from regulation regardless of the other issues relating to the permit application.

SO ORDERED.

/s/
AVERN COHN

Dated: January 24, 2000

Detroit, Michigan

APPENDIX D

No. 98-1595

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

MICHIGAN PEAT, A DIVISION OF
BAY-HOUSTON TOWING COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; United States of America; Regional Administrator of Region V of the United States Environmental Protection Agency, State of Michigan; Michigan Department of Environmental Quality; Director of Michigan Department of Environmental Quality,

Defendants-Appellees.

Argued Feb. 2, 1999.
Decided April 28, 1999.

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

OPINION

SILER, Circuit Judge.

Plaintiff, Michigan Peat, a division of Bay-Houston Towing Co., filed a declaratory action against defendants, the United States of America, the United States Environmental Protection Agency ("EPA"), the Regional Administrator of Region V of the EPA ("Region V Administrator"), the State of Michigan, the Michigan Department of Environmental

Quality ("MIDEQ"), and the Director of the MIDEQ ("Director"), generally seeking a finding that defendants (1) acted contrary to the regulations and statutory law that govern the unified Clean Water Act ("CWA") Section 404 program, and (2) violated Michigan Peat's constitutional rights. The district court dismissed the action against the federal defendants for lack of subject-matter jurisdiction and dismissed the action against the state defendants on grounds that the suit was barred by the Eleventh Amendment. For the following reasons, we AFFIRM the dismissal of the action against the state defendants and REVERSE the dismissal of the action against the federal defendants.

BACKGROUND

Statutory Framework

The CWA was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It prohibits the discharge of any pollutant into the navigable waters of the United States except when authorized by a permit or exception spelled out in the Act. *See* 33 U.S.C. § 1311(a). Wetland areas are considered navigable waters for purposes of applying the Act. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

Section 404 of the CWA authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers ("Corps"), to issue permits allowing the release of dredged and fill matter into the waterways subject to the terms and procedures set forth in the CWA. *See* 33 U.S.C. § 1344(a). The CWA empowers the EPA to authorize a unified wetlands permitting program which gives a state the authority to render a comprehensive federal/state wetland permit decision with the federal government playing the role of the overseer in the consideration of permit applications. *See* 33 U.S.C. §§ 1344(g)-(m); 40 C.F.R. §§ 233.10-233.16, 233.53. In short, the scheme provides applicants with "one

stop shopping" for a wetland permit.[1] Under the Section 404 program, the EPA retains full enforcement authority. *See* 33 U.S.C. § 1344(n). To date, only Michigan and New Jersey have been approved to operate the Section 404 scheme. *See* 40 C.F.R. §§ 233.70, 233.71. Michigan has been operating its program for 13 years, currently through the MIDEQ. *See* 40 C.F.R. § 233.70.

In order to obtain a permit to engage in activity within a wetland in Michigan, an applicant must proceed through the prescribed permit process. *See* 40 C.F.R. § 233.30. A brief outline of the steps in the application process follows:

1. An applicant must file an application with the Director of the MIDEQ.

2. Once the application is deemed complete, the MIDEQ must issue a public notice announcing the opportunity to request a public hearing.

a. The minimum time for public notice is 30 days during which interested parties may express their views concerning the application.

b. Any interested person may request a public hearing, which will be held at the MIDEQ's discretion.

3. The MIDEQ must promptly send the EPA a copy of the application.

4. Within 10 days of its receipt of the application, the EPA must forward the application to the Corps, the United States Fish & Wildlife ("USFW"), and the National Management Forestry Service ("NMFS").

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[1] In the most simplistic terms, the Section 404 program administered by a state "suspends" the federal program in that particular state because the state's own program is environmentally sound. *See* 33 U.S.C. §§ 1344(g)(1), 1344(h)(2)(A). The Section 404 program does not allot all the power to the state or to the federal government, but rather the two share joint control. In essence, they are partners.

a. These agencies must advise the EPA of their desire to comment on the application within 15 days of their receipt of the application.

b. If these agencies desire to comment, they must submit their comments to the EPA within 50 days of their receipt of the application.

5. Within 30 days of its receipt of the application, the EPA must indicate to the MIDEQ in writing whether it will comment on the application.

a. If the EPA declines to comment, the MIDEQ may issue a permit after the close of the public comment period upon (1) reviewing the application for compliance with designated environmental criteria, and (2) considering all comments received. The MIDEQ's determinations regarding each application must be in writing and the basis thereof must be outlined.

6. Within 90 days of its receipt of the application, the EPA must provide its written comments and issue objections to the permit request.

a. If the EPA timely objects, the State shall not issue the proposed permit unless it modifies the permit in accordance with the EPA's comments.

b. If the State does not satisfy the EPA's objections or deny the permit, authority to process the Section 404 permit is transferred to the Corps.

c. In cases where the EPA objects to the issuance of a permit, within 90 days after the propoundment of any objections by the EPA and after discussions with the Director of the MIDEQ, the EPA may withdraw its objections and a final permit decision may issue.

d. If the EPA's objections are not timely, the State may not issue a permit, but must forward the application to the Corps.

7. Based on whether 6(a), (b), (c) or (d) occurs, a permit may or may not issue. *See* 33 U.S.C. § 1344(j); 40 C.F.R. §§ 233.30-53.

The Section 404 scheme does not usurp the state's authority to issue a permit under state law.

Facts

Michigan Peat engages in business activities which include the extraction of peat. It owns and controls two noncontiguous parcels of land in Minden, Sanilac County, Michigan, referred to as Minden North and Minden South and situated within a wetland area known as the Minden Bog. The Minden North parcel is approximately 2,000 acres and the Minden South parcel comprises approximately 819 acres. Since 1958, Michigan Peat has extracted peat from a portion of the Minden North site.

In 1991, Michigan Peat filed a wetland permit application under the Section 404 program which would authorize it to discharge dredged or fill materials and to conduct related activities at the Minden tracts. Midway through the application process, the State of Michigan requested that Michigan Peat place its then incomplete application on hold and develop an environmental site assessment ("ESA"). Michigan Peat complied; it developed an ESA from 1992-1994. In September 1994, Michigan Peat renewed its permit application to expand its operations to Minden South and to the unopened portions of Minden North. Specifically, Michigan Peat requested (1) a definition concerning the extent of the peat mining areas which were opened prior to October 1, 1980, (2) an after-the-fact authorization for areas where peat mining was initiated after October 1, 1980, and (3) authorization to expand the peat removal operations into an additional 1,792 acres of previously unmined wetlands.

Thereafter, the EPA reviewed Michigan Peat's application and on October 6, 1994 notified the MIDEQ Section 404 Director that it intended to comment. The EPA forwarded its written comments, as well as those of the Corps and the

USFW, to the MIDEQ on December 23, 1994. The EPA objected to the permit application which sought permission to expand mining from 951 to all 2,819 acres of the facility. Michigan Peat responded to the EPA's objections. The MIDEQ and the EPA discussed the latter's objections and created a revised draft permit. With its concerns addressed by the new draft permit, on March 21, 1995 the EPA withdrew its objections.[2] Thereafter, the MIDEQ tendered a proposed permit to Michigan Peat along with a letter which outlined the proposed permit. The letter read in part:

> Approximately 749 acres of the bog [Minden North] . . . were impacted prior to October 1, 1980 and therefore do not fall under [our] jurisdiction.
>
> Approximately 202 acres of the bog [Minden North] have been impacted from October 1, 1980 to the present . . . . [A]n after the fact permit can be issued for the 202-acre area if the applicant agrees to accept all conditions shown on the attached permit. Please be advised that failure to accept the permit leaves the company with no authorization to extract peat within the areas opened since October 1, 1980.
>
> Attached you will find a modified permit for continuation of peat mining in areas defined in the paragraph above. This permit is not valid until it is signed by the permittee. The applicant is requested to fully review the limitations (conditions) and terms of the permit. Upon agreeing to accept and comply with all limitations (conditions) and terms of the permit, the applicant must sign, date, and return it to this office. The signed permit must be

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[2] The EPA's letter to the MIDEQ stated:

> The State's draft permit effectively addresses concerns previously raised by EPA and, on that basis, I am withdrawing our objection in accordance with provisions of 40 C.F.R. 233.50(j), on condition than the final permit not differ materially from this draft. If there are substantive changes to this draft decision by MDNR, we would need to review these changes to determine whether or not they are material to us.

> received by this office no later than 15 days from the date of this letter.
>
> . . .
>
> [T]he portion of your application proposing expansion of the peat removal operation into the unmined area of the Minden Bog [to wit—the remainder of Minden North, approximately 1049 acres, and the entire Minden South parcel, approximately 819 acres] is hereby denied.

The permit also set forth which lands Michigan Peat could impact and outlined the limitations (conditions) imposed on Michigan Peat upon acceptance of the proposed permit. Just above the signature line, the permit read: "This permit shall become valid on the date of signature by the permittee. Upon signing by the permittee, a copy of the signed permit must be returned to the [MIDEQ]." Michigan Peat did not sign and return the tendered permit.

Rather, Michigan Peat decided to accept Part I of the decision, but to contest Parts II and III in two different forums. Pursuant to Michigan's Administrative Procedures Act, MICH. COMP. LAWS § 24.201 *et seq.* ("APA"),[3] Michigan Peat initiated a state administrative appeal of Part II of the permit, the after-the-fact permit subject to conditions. Part II of the permit contained several conditions unacceptable to Michigan Peat, to wit—(1) a requirement that Michigan Peat place land in a conservation easement in order to utilize the permit, (2) a complete waiver requirement, and (3) an indemnification requirement for the benefit of the State of Michigan. Concurrently, Michigan Peat filed an action against the MIDEQ in the Michigan Court of Claims asserting federal and state takings claims based on Part III of the permit decision, the complete prohibition against peat harvesting on approximately 2,000

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[3] The APA contains a provision that allows a business activity of a continuing nature operating under a previous license or charter to continue to operate while appealing a permit decision. *See* MICH. COMP. LAWS § 24.291.

acres of Michigan Peat's property. Shortly after the state suit was filed, the parties entered a joint stipulation, which allowed Michigan Peat to continue operating on the 951 acres of the Minden facility that the MIDEQ had authorized in Part I of its proposed permit.

On June 6, 1997, the MIDEQ Director issued Michigan Peat a state-only permit which granted Michigan Peat authorization under all applicable state wetland laws to extract peat on 2,819 acres of the company's Minden parcels, subject to certain restrictions. The permit stated that it modified the March 21, 1995 permit decision by allowing the expansion of peat extraction into all previously unmined portions of Minden North and Minden South. The permit concluded with the following caveat:

> ISSUANCE OF THIS PERMIT DOES NOT AUTHORIZE ANY WORK UNDER THE AUTHORITY OF THE FEDERAL CLEAN WATER ACT. Any work initiated on this project without required § 404 approval may be considered a violation of Federal Law. For further information, contact the United States Environmental Protection Agency, Region 5.

The cover letter which accompanied the state permit suggested that Michigan Peat contact the Corps for federal authorization.

On June 18, 1997, the EPA wrote the MIDEQ (with a copy to Michigan Peat) in response to the issuance of the state permit. The EPA observed that the state permit differed greatly from the proposed Section 404 permit, which it contended had been rejected by Michigan Peat by its refusal to sign and return it and by its dual challenges to it and thus had never become effective. Additionally, the EPA articulated that it had objected to earlier proposals to authorize certain activities encompassed in the new state permit and reiterated its previously-stated objections. Finally, the EPA concluded that because the MIDEQ had failed to issue a final permit which satisfied the EPA's

objections, authority to process Michigan Peat's permit application rested with the Corps by operation of law.

On June 23, 1997, the Corps advised Michigan Peat that it would handle the Section 404 permitting procedure with regard to the Minden parcels and would begin its process upon receipt of a complete application.

Course of Proceedings

Prior to the issuance of the state-only permit, on May 16, 1997, Michigan Peat filed for declaratory relief in federal court specifically seeking a determination that: (1) Michigan Peat's conduct fully complies with the Section 404 program for the State of Michigan; (2) Michigan Peat's permit process, including the appellate and takings remedies pursued by Michigan Peat fully comply with and are a part of the Section 404 program; (3) the federal government is bound by the March 1995 permit decision; (4) a state court order be entitled to full faith and credit; (5) the EPA is barred by estoppel from modifying Michigan's approved permit program and circumventing the permit process; (6) the EPA's express threats to circumvent the CWA and its promulgated regulations including its demand that Michigan Peat stay or dismiss its constitutional and statutory takings claims, constitute denial of Michigan Peat's procedural and substantive due process rights under the U.S. Constitution; (7) the EPA's effort to modify the program and circumvent the permit process constitutes an impairment of contract in violation of Article I, section 10, clause 1 of the U.S. Constitution; (8) Michigan Peat's harvesting activities are exempt from regulation under Michigan's Section 404 program; (9) the disparate treatment of Michigan Peat under the delegated program constitutes a violation of the equal protection clause of the U.S. Constitution; and (10) the state-only permit does not modify the 1995 permit decision and does not strip Michigan Peat of its appellate rights and remedies under the Section 404 program. Subsequently, the district court dismissed the claims asserted against the state defendants based on their Eleventh Amendment immunity, and dismissed the claims asserted against the federal

defendants for lack of subject-matter jurisdiction over suits for pre-enforcement relief.

DISCUSSION

The district court erred by dismissing Michigan Peat's action against the federal defendants.

We review questions of subject-matter jurisdiction de novo. *See Friends of the Crystal River v. United States Envtl. Protection Agency*, 35 F.3d 1073, 1077 (6th Cir. 1994).

Michigan Peat argues that the issuance of the March 21, 1995 permit was a final agency action and therefore subject to judicial review. On the other hand, the federal defendants contend that the issuance of the proposed permit was not a final agency action and therefore not subject to judicial review. Michigan Peat correctly cites *Friends of the Crystal River*, a case involving the CWA Section 404 program in Michigan. In that case, this court recognized the difference between challenges to final agency actions and challenges to preenforcement actions and stated that the latter are not subject to judicial review while the former are subject to judicial review. *Id.* at 1077-78.

The federal defendants' reliance on *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement*, 20 F.3d 1418, 1426-27 (6th Cir. 1994), is misplaced. In that case, this circuit followed the lead of the Fourth and Seventh circuits which previously found that "district courts lack jurisdiction to review compliance orders prior to the commencement of enforcement proceedings." *Id.* (citing *Southern Pines Assocs. v. United States*, 912 F.2d 713, 716 (4th Cir. 1990), and *Hoffman Group Inc. v. Envtl. Protection Agency*, 902 F.2d 567, 569 (7th Cir. 1990)). *Southern Ohio Coal Co.* involved an emergency situation constituting a violation of an existing Section 402 permit. Plaintiff in that case challenged the EPA's pre-enforcement emergency response activity, not a final agency action.

The outcome of this issue turns on whether the EPA committed a final agency action. In the case at bar, the federal defendants timely voiced their objections throughout the application process, but ultimately withdrew them and agreed to the proposed 1995 permit that the MIDEQ sent to Michigan Peat. While it is true that the 1995 permit specifically stated that it was not final or valid until signed and accepted by the permittee and returned to the MIDEQ, the logical conclusion is that the EPA's action was final. Statutorily, there was nothing left for the EPA to do once it signed off on the proposed permit. Moreover, if Michigan Peat did sign the permit it would have waived the appellate remedies it is pursuing. Therefore, the district court erred in finding that it did not have subject-matter jurisdiction over the final agency action.[4]

The district court did not err by dismissing Michigan Peat's action against the state defendants.

We review questions involving the Eleventh Amendment *de novo* as they are issues of law. *See Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997).

The district court correctly found that the Eleventh Amendment shields Michigan and the MIDEQ from Michigan Peat's claims. First, Congress has not abrogated Michigan's immunity. *See Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) (holding that the

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[4] The federal defendants contend that Michigan Peat's complaint and amended complaint are mooted by the EPA's filing of an enforcement action against Michigan Peat in the United States District Court for the Eastern District of Michigan in June 1998. The federal defendants rely on the theory of "prudential mootness." *See Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). Acceptance of defendants' argument turns on a finding that the enforcement action will resolve the claims raised by Michigan Peat in the underlying action. A review of Michigan Peat's amended complaint indicates that this is simply not the case. Accordingly, this court finds that Michigan Peat's appeal is not moot. Maybe the two cases can be consolidated on remand of this case.

only remaining authority under which Congress can abrogate Eleventh Amendment immunity is section 5 of the Fourteenth Amendment). Clearly, Congress has not attempted to abrogate the states' Eleventh Amendment Immunity by enacting the CWA which was promulgated under Article I powers, not pursuant to the Fourteenth Amendment. Second, Michigan has not unequivocally waived its Eleventh Amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (requiring that such a waiver be "unequivocally expressed"). The fact that Michigan volunteered to involve itself in the Section 404 program does not constitute consent to be sued in federal court. As neither of the only two circumstances exist in which Eleventh Amendment immunity may be waived, the state defendants are protected by the Eleventh Amendment. *See Thiokol Corp. v. Michigan Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993).

The district court was correct in finding that Michigan Peat may not sue the Director of the MIDEQ under the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). While the district court followed *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-278, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997),[5] an additional reason for shielding the Director from Michigan Peat's claims in federal court is that Michigan Peat failed to allege that the Director has individually taken actions which constitute continuing violations of federal law.

Accordingly, the district court's dismissal of Michigan Peat's claims against the state defendants based on the

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[5] The district court found that Michigan Peat "has not shown lack of a 'state forum available to vindicate federal interests' and does not seek 'prospective relief based on federal violations' to vindicate a federal right." While Michigan Peat contends that it seeks to prevent future negative consequences flowing from legal recognition of the issuance of the state-only permit, in actuality, to cure the "future consequences" of the past act, the court must address the past act, to wit--the June 1997 permit.

Eleventh Amendment immunity bar is AFFIRMED and the district court's dismissal of Michigan Peat's claims against the federal defendants based on the lack of subject-matter jurisdiction is REVERSED. This case is REMANDED for further proceedings in accordance with this opinion.

APPENDIX E

01-1154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed November 16, 2001

MICHIGAN PEAT,
Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants-Appellees.

Nov. 16, 2001

BEFORE: MARTIN, Chief Judge; NELSON, Circuit Judge; and RICE,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

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* Hon. Walter H. Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/
Leonard Green, Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543-0001

February 5, 2002

Mr. John G. Roberts Jr.
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004

Re: Michigan Peat
v. Environmental Protection Agency, et al.
Application No. 01A580

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 5, 2002, extended the time to and including March 18, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Ruth Jones
RUTH JONES
Assistant Clerk

Supreme Court, U.S.
FILED
MAY 22 2002

No. 01-1384

In the Supreme Court of the United States

MICHIGAN PEAT, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 404 of the Clean Water Act, 33 U.S.C. 1344, and regulations promulgated thereunder, direct the transfer of permitting authority to the United States Army Corps of Engineers when an authorized State fails to issue a permit that satisfies objections timely communicated to the State by the Environmental Protection Agency.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Friends of Crystal River v. *United States EPA*, 35 F.3d 1073 (6th Cir. 1994)	4
Michigan Peat v. *Regional Adm'r of Region V of the United States EPA*, 7 F. Supp. 2d 896 (E.D. Mich. 1998)	9
Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998)	14
United States v. *Bay-Houston Towing Co., Inc.*, No. 98-73252, 2002 WL 537630 (E.D. Mich. Mar. 13, 2002)	17
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	14

Statutes and regulations:

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*)	2
33 U.S.C. 1251(a)	2
33 U.S.C. 1251(b)	2
33 U.S.C. 1311(a)	2
33 U.S.C. 1344 (§ 404)	2, 4, 5, 7, 8, 9, 15
33 U.S.C. 1344(a) (§ 404(a))	2
33 U.S.C. 1344(g)	3
33 U.S.C. 1344(g)(1)	3
33 U.S.C. 1344(h)(2)(A)	3

Statutes and regulations—Continued: Page

33 U.S.C. 1344(j) 3, 4, 13, 15
33 U.S.C. 1362(6) (Supp. V 1999) 2
33 U.S.C. 1362(7) 2
33 U.S.C. 1362(12) 2
40 C.F.R.:
Sections 233.10-233.16 3
Sections 233.30-233.38 4
Section 233.35(b)(1) 4
Sections 233.50-233.51 4
Section 233.50(j) 4, 15, 17
Section 233.53 3
Section 233.70 ..... 4, 5
Section 233.71 4

Miscellaneous:

62 Fed. Reg. 61,173 (1997) 5

In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinions of the district court (Pet. App. 3a-9a, 10a-19a) are unreported. A prior opinion of the court of appeals in this case (Pet. App. 20a-32a) is reported at 175 F.3d 422. A prior opinion of the district court is reported at 7 F. Supp. 2d 896.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2001. A petition for rehearing was denied on November 16, 2001 (Pet. App. 33a-34a). On February 5, 2002, Justice Stevens extended the time within which to file a petition for certiorari to and including March 18, 2002 (Pet. App. 35a), and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The Act prohibits the discharge of any pollutant from a point source into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a); see 33 U.S.C. 1362(6) (Supp. V 1999), (7) and (12) (defining "pollutant," "navigable waters," and "discharge of a pollutant"). Section 404(a) of the Act authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers (Corps), to "issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites," subject to the terms and procedures set forth in the CWA. 33 U.S.C. 1344(a).

The CWA provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b). Consistent with that policy, the CWA allows the States to assume the primary role of administering several of the permitting programs established by the Act, including the Section 404 permitting program, subject to continuing federal oversight. 33 U.S.C. 1344. The Act provides that "[t]he Governor of any State desiring to administer its own individual and general

permit program for the discharge of dredged or fill material into" particular categories of navigable waters may submit to the Environmental Protection Agency (EPA) "a full and complete description of the program it proposes to establish and administer under State law." 33 U.S.C. 1344(g)(1). If EPA determines that the state program satisfies the statutory criteria, see 33 U.S.C. 1344(g), EPA shall approve the program and so notify the State. 33 U.S.C. 1344(h)(2)(A).[1]

Even where a state-administered program is in effect, the EPA retains substantial oversight and enforcement responsibilities. The Act requires the administering state agency to transmit to EPA "a copy of each permit application received by such State and provide notice to [EPA] of every action related to the consideration of such permit application, including each permit proposed to be issued by such State." 33 U.S.C. 1344(j). EPA is in turn directed to forward the application to the Corps and to the Fish and Wildlife Service, an agency within the Department of the Interior. 33 U.S.C. 1344(j). If EPA intends to submit written comments to the State with respect to the permit application, it must so notify the State within 30 days after receipt of the permit application and must provide the written comments not later than 90 days after the date of such receipt. 33 U.S.C. 1344(j). If EPA submits a timely objection to the issuance of the proposed permit, a State "shall not issue the proposed permit" unless the State "modifies such proposed permit in accordance with [EPA's] comments." 33 U.S.C. 1344(j).

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[1] EPA regulations concerning the submission and approval (or disapproval) of State-submitted CWA Section 404 programs are published at 40 C.F.R. 233.10-233.16. See also 40 C.F.R. 233.53 (withdrawal of approval).

The State retains authority to issue the permit so long as it modifies the proposed permit to meet EPA's concerns within the time limitations set out in 33 U.S.C. 1344(j). If EPA's objections cannot be resolved, however, the State may not issue the permit. In that situation, permitting authority as to that permit reverts to the Corps of Engineers, by operation of law.[2] See *Friends of Crystal River* v. *United States EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994).

EPA's regulations regarding permit applications submitted under a state-administered Section 404 permitting program, and regarding federal oversight of such permit applications, are published at 40 C.F.R. 233.30-233.38 and 233.50-233.51. Those regulations provide that, in the absence of EPA objections, a State-issued permit "becomes effective when it is signed by the Director [of the pertinent state agency] and the applicant." 40 C.F.R. 233.35(b)(1). The regulations further provide that "[i]n the event that the Director [of the pertinent state agency] neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary [of the Army] shall process the permit application." 40 C.F.R. 233.50(j).

Michigan and New Jersey are the only two States with approved CWA Section 404 permitting programs. See 40 C.F.R. 233.70, 233.71. The approved Michigan Section 404 permitting program appears at 40 C.F.R.

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[2] "In any case where [EPA] objects to the issuance of a permit, on request of the State, a public hearing shall be held by [EPA] on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary [of the Army] may issue the permit * * * in accordance with the guidelines and requirements of [the Act]." 33 U.S.C. 1344(j).

233.70. Section 233.70 provides that "[t]he applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan * * * is the program administered by the Michigan Department of Natural Resources [DNR]." The State recently transferred the responsibility for administering its Section 404 program from the DNR to its Department of Environmental Quality (DEQ). 62 Fed. Reg. 61,173 (1997).

2. Petitioner Michigan Peat conducts business activities that involve the mining of peat from wetlands parcels situated near Minden, Michigan. Pet. App. 24a. The company owns or controls two wetlands parcels, referred to as Minden North and Minden South, that are situated within a wetlands area known as the Minden Bog. *Ibid.*[3] In 1991, petitioner applied to the DNR for a permit that would authorize the company to discharge dredged or fill materials and to conduct related activities in the Minden tracts. C.A. App. 209. That application was subsequently withdrawn to allow the company additional time to complete the necessary environmental assessment studies. *Ibid.* On Septem-

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[3] Minden Bog is described as follows in DNR's March 21, 1995, report prepared in response to Michigan Peat's 1994 permit application:

> Minden Bog is a rare and irreplaceable wetland ecosystem which has significant ecological and scientific value. It is located in Sanilac County, where approximately 78 percent of the wetlands which existed prior to European settlement have been lost, along with wetland functions such as flood storage, wildlife habitat, and groundwater recharge. Currently, the Minden Bog includes about 4000 acres on State and private land, of which about 3200 acres exists in a natural and undisturbed condition.

C.A. App. 207.

ber 19, 1994, Michigan Peat again submitted a permit application to DNR. *Id.* at 308.

In December 1994, after obtaining comments from the Corps and the Fish and Wildlife Service, EPA formally notified DNR that EPA objected to petitioner's application. C.A. App. 74, 97. DNR and EPA subsequently conducted numerous discussions to address EPA's concerns. *Id.* at 97. Those discussions resulted in a revised draft permit that would have restricted peat mining to previously disturbed areas in Minden North and ensured that additional wetland losses in the Minden Bog complex were avoided. *Ibid.* The proposed permit would also have required the company to reclaim all 830 previously disturbed acres to wetlands after mining, without regard to the date when mining had first occurred. *Ibid.* By letter dated March 21, 1995, EPA advised DNR that EPA was withdrawing its objections. *Ibid.* That letter stated in part:

> The State's draft permit effectively addresses concerns previously raised by EPA and, on that basis, I am withdrawing our objection in accordance with provisions of 40 CFR 233.50(j), *on condition that the final permit not differ materially from this draft. If there are substantive changes to this draft decision by MDNR, we would need to review these changes to determine whether or not they are material to us.*

Ibid. (emphasis added).

On March 21, 1995, DNR tendered a proposed permit to petitioner. C.A. App. 98; see Pet. App. 25a. That permit stated that "[a]pproximately 749 acres of bog were disturbed prior to passage of" the State's wetlands protection law and that "[t]hese areas [of the Minden North tract] do not require a permit from the Michigan Department of Natural Resources to continue

the peat mining activity." C.A. App. 104. The tendered permit would also have authorized peat extraction activities within an additional previously disturbed area of approximately 202 acres of the Minden North tract, subject to certain conditions and restrictions (including requirements for reclamation of all disturbed areas of the bog without regard to when mining had commenced on them). See *id.* at 101, 106. The tendered permit would not have authorized activities on the remaining portions of the north parcel and would have denied authorization as to the entire south parcel. *Id.* at 101-102. Finally, the tendered permit stated that the "permit shall become valid on the date of signature by the permittee." *Id.* at 111; see also *id.* at 101 (DNR cover letter states that "[t]his permit is not valid until it is signed by the permittee").

3. Petitioner did not sign and return the tendered permit. Instead, petitioner initiated a state administrative appeal in "an effort to change the limitations and conditions of the draft permit." Pet. App. 4a; see *id.* at 26a. Petitioner also filed an action against the State in the Michigan Court of Claims, alleging that the denial of its permit request with regard to the undisturbed portions of the properties effected a taking of property that required the payment of just compensation. C.A. App. 21; Pet. App. 26a-27a.

4. On May 16, 1997, petitioner filed suit in federal district court against EPA and other federal parties. Pet. App. 28a. Petitioner sought, *inter alia*, a declaration that its operations were in full compliance with CWA Section 404. *Ibid.* On June 6, 1997, DEQ issued Permit No. 94-8-342, which authorized petitioner to extract peat on 2819 acres of the company's Minden parcels, subject to certain restrictions and limitations. C.A. App. 123. That permit stated, however, that

"ISSUANCE OF THIS PERMIT DOES NOT AUTHORIZE ANY WORK UNDER THE AUTHORITY OF THE FEDERAL CLEAN WATER ACT. Any work initiated on this project without required Section 404 approval may be considered a violation of Federal law." *Ibid.*; see Pet. App. 27a. The cover letter that accompanied the permit stated that, because of EPA's continuing objections, DEQ was "precluded by federal law from authorizing this project under Section 404 of the Clean Water Act" and that petitioner could "seek federal authorization for the project directly from the U.S. Army Corps of Engineers, Detroit District." C.A. App. 173.

By letter to DEQ dated June 18, 1997 (C.A. App. 132-133), EPA "observed that the state permit differed greatly from the proposed [May 1995] Section 404 permit," and noted that EPA "had objected to earlier proposals to authorize certain activities encompassed in the new state permit." Pet. App. 27a. The letter also stated that "[a] final permit issued by the MDNR on March 21, 1995 was rejected by [petitioner] and has never become effective." C.A. App. 132. EPA advised DEQ that because it had failed to issue a final permit that satisfied EPA's objections, "pursuant to Section 404(j) of the CWA and 40 C.F.R. § 233.50(j), authority to process [petitioner's] permit application has been transferred by operation of law to the U.S. Army Corps of Engineers." *Id.* at 133. On June 23, 1997, the Corps advised petitioner that the State's CWA Section 404 permitting authority with regard to the Minden parcels had been transferred to the Corps. *Id.* at 175. The Corps further informed the company that "[t]he processing of a federal Section 404 permit by the Corps will begin upon the Corps' receipt of a complete application from you." *Ibid.*

Petitioner thereafter amended its complaint in the suit against the federal defendants to add DEQ, its director, and the State of Michigan as defendants, and to assert additional claims. The district court dismissed the claims against the state defendants based on Eleventh Amendment immunity, and it dismissed the claims against the federal defendants for lack of subject-matter jurisdiction. *Michigan Peat* v. *Regional Adm'r of Region V of the United States EPA*, 7 F. Supp. 2d 896 (E.D. Mich. 1998); see Pet. App. 28a-29a. The court of appeals affirmed the judgment of the district court with respect to the claims against the state defendants, but reversed the district court's dismissal of petitioner's claims against the federal defendants. *Id.* at 20a-32a. The court found that EPA's conditional withdrawal of objections to the proposed 1995 permit constituted "final agency action" subject to review in federal court. *Id.* at 29a-30a. The court remanded the case to the district court for further proceedings. *Id.* at 32a.

5. On remand, the district court ruled in favor of the federal defendants (respondents in this Court). In an opinion dated January 24, 2000, the court entered partial summary judgment for the respondents. Pet. App. 10a-19a. The court rejected petitioner's contention that the Corps had acted improperly by assuming regulatory authority over petitioner's CWA Section 404 application after the DEQ had granted a "state-only" permit. *Id.* at 16a-17a. The court observed that "under § 404(j) of the CWA [33 U.S.C. 1344(j)] the authority to issue § 404 permits is transferred from a state back to the Corps as a matter of law wherever a state has failed within the time prescribed by law to amend its proposed permit to conform to objections raised by the EPA." *Id.* at 16a. The court then explained:

> While it is true that the State here did satisfy the EPA's objections during the 90 day period as to the March 1995 permit, and only later issued the state-only permit which failed to conform to the EPA's objections, there is no compelling reason to bar the transfer of authority beyond this 90 day period. The state-only permit constituted a second permit decision.

Ibid. The district court stated that petitioner "had the right to administratively appeal MDEQ's decision" to impose conditions in the March 1995 proposed permit, "and MDEQ had the authority to issue a state-only permit." *Id.* at 17a. The court observed, however, that "[n]one of this changes the provision under 40 C.F.R. § 233.[5]0 that if the state does not satisfy the EPA's objections or deny the permit, authority to process the § 404 permit is transferred to the Corps." *Ibid.* The court reserved for further proceedings the question whether the EPA's withdrawal of objections to the March 1995 proposed permit conferred upon petitioner an entitlement to harvest the 749 acres that had first been disturbed before the passage of the state wetlands protection law. *Id.* at 12a-15a, 19a; see pp. 6-7, *supra.*

Approximately one year later, the district court decided the question, reserved in its January 2000 opinion, concerning the status of the 749 acres. Pet. App. 3a-9a. The court rejected petitioner's contention that the court of appeals' decision on the earlier appeal had established that those acres were not subject to federal regulation. The court explained that the prior Sixth Circuit decision "simply said that the sign-off by the [EPA] on the draft permit was final agency action and that this Court had subject matter jurisdiction. The

Court of Appeals did not comment on the merits of the complaint." *Id.* at 4a. The court further observed:

> EPA's final agency action was merely to agree to the text of the draft permit. The draft permit, however, was subject to limitations and conditions. If any limitation or condition of the draft permit was changed, there was no longer agreement on the part of EPA. [Petitioner's] refusal to sign the draft permit effectively meant that there was no permit.
>
> [Petitioner's] administrative appeal under [state law] is an effort to change the limitations and conditions of the draft permit. If [petitioner] is successful in the administrative appeal, the end result will be a recommendation to the director of [the DEQ]. If the director accepts any changes recommended through the administrative proceeding, the permit which issued will contain different limitations and conditions than those to which EPA consented. Effectively, [petitioner] will not have a valid permit because EPA did not * * * approve it. The refusal to sign the draft permit vitiated the EPA's consent.

Id. at 4a-5a. The district court concluded that "[t]here is nothing in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, or in the delegation to the state under section 404(a), 40 C.F.R. § 233.70, to exempt from regulation the 749 acres." *Id.* at 6a.

6. The court of appeals affirmed. Pet. App. 1a-2a. Petitioner did not challenge the district court's ruling that authority to issue a CWA permit was legally transferred to the Corps of Engineers when the State elected to include, in the "state-only" permit, provisions that were inconsistent with EPA's previously stated objections. Petitioner instead contended that the dis-

trict court's decision on remand was inconsistent with the court of appeals' earlier ruling, which petitioner characterized as a binding determination that the 749 acres were exempt from regulation under the Clean Water Act. See Pet. C.A. Br. 22-28; Pet. App. 2a. The court of appeals stated: "We have reviewed the reasoning of the district court and now AFFIRM." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14) that "the Sixth Circuit's decision conflicts with decades of this Court's precedent holding that government agencies must strictly follow their procedural rules." That argument is without merit. Nothing in the court of appeals' decision suggests that the court viewed the Corps or EPA as having breached any pertinent federal regulation, or that the court would have condoned such a breach. Indeed, petitioner did not argue in the court of appeals that any violation of agency rules had occurred. The petition for certiorari should therefore be denied.

1. The court of appeals simply stated: "We have reviewed the reasoning of the district court and now AFFIRM." Pet. App. 2a. In arguing that the court of appeals condoned an EPA violation of the agency's own rules, petitioner relies primarily (see Pet. 19, 22) on the district court's statement that "there is no compelling reason to bar the transfer of authority [from state to federal officials] beyond this 90 day period." Pet. App. 16a. Petitioner characterizes that statement as an indication that "the courts below saw 'no compelling reason' for EPA to follow its controlling regulations." Pet. 22. Careful examination of the relevant passage, however, makes clear that petitioner has misread the district court's opinion.

In holding that the Corps had properly assumed regulatory authority over petitioner's CWA Section 404 application after the DEQ granted a superseding "state-only" permit, the district court explained:

> While it is true that the State here did satisfy the EPA's objections during the 90 day period as to the March 1995 permit, and only later issued the state-only permit which failed to conform to the EPA's objections, there is no compelling reason to bar the transfer of authority beyond this 90 day period. *The state-only permit constituted a second permit decision.*

Pet. App. 16a (emphasis added). As the italicized language makes clear, this passage does not suggest that EPA or the Corps may ignore the requirement, stated both in the governing regulations and in 33 U.S.C. 1344(j) itself, that EPA must raise any objections to a permit application filed with state authorities within 90 days after EPA receives the application from the State. Rather, the district court held that permitting authority had been transferred from DEQ to the Corps in June 1997, notwithstanding the expiration of "the 90 day period as to the March 1995 permit," because "[t]he state-only permit constituted a second permit decision." Pet. App. 16a. The thrust of the district court's analysis was that the transfer of authority occurred by operation of law when DEQ issued a permit that did not conform to EPA's previously stated objections. See *ibid.* (district court notes that "under § 404(j) of the CWA [33 U.S.C. 1344(j)] the authority to issue § 404 permits is transferred from a state back to the Corps as a matter of law wherever a state has failed within the time prescribed by law to amend its proposed permit to conform to objections raised by the EPA"). As we

explain below (see pp. 14-16, *infra*), that conclusion is correct. But even if the district court's analysis were open to question, there would be no basis for inferring that the court deliberately condoned an agency breach of its own regulation.

2. The fact that petitioner failed to present its current arguments to the court of appeals provides an independent reason for this Court to deny review. In the court of appeals, petitioner did not cite *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); petitioner did not contend that the district court had countenanced an agency's breach of its own regulation; indeed, petitioner did not even contend that a breach of agency rules had occurred. This Court ordinarily does not consider issues neither raised before nor considered by the court of appeals. See, *e.g.*, *Pennsylvania Dept. of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (collecting cases). In addition, petitioner's failure to allege in the court of appeals that the agency had breached its own rules further undermines petitioner's current contention that the Sixth Circuit implicitly authorized such an agency violation.

3. In contending that "EPA ignored the strictures of its governing regulations" when it informed petitioner and the DEQ that permitting authority had been transferred to the Corps in June 1997, petitioner states that "Michigan issued a *final* Section 404 permit" in March 1995, leaving EPA with "no further role to play." Pet. 18. As the district court correctly recognized, however, the March 1995 proposed permit never became "final" because petitioner failed to sign the permit within the specified time. Pet. App. 13a; see C.A. App. 111 (March 1995 proposed permit states that the "permit shall become valid on the date of signature by the permittee"); *id.* at 101 (DNR cover letter states that "[t]his

permit is not valid until it is signed by the permittee"). Moreover, EPA's withdrawal of objections to the March 1995 proposed permit was made subject to the express "condition that the final permit not differ materially from this draft." *Id.* at 97. EPA stated at that time that "[i]f there are substantive changes to this draft decision by MDNR, we would need to review these changes to determine whether or not they are material to us." *Ibid.* EPA thus anticipated the possibility that further exchanges between petitioner and DEQ might result in additional amendments to the permit, and it made clear that any such changes would be subject to federal agency review. There is consequently no basis for petitioner's contention that EPA's conditional withdrawal of objections to the March 1995 proposed permit precluded the Corps from asserting authority over the Section 404 program after (a) petitioner refused to sign the proposed permit and (b) the DEQ issued a "state-only" permit containing substantially different terms.

The CWA provides that if the State fails to resubmit a permit to which EPA has objected, revised to meet EPA's objections within 30 days, "the Secretary [of the Army] may issue the permit." 33 U.S.C. 1344(j). The regulations similarly provide that "[i]n the event that the Director [of the pertinent state agency] neither satisfies EPA's objections or requirements for a permit condition nor denies the permit, the Secretary [of the Army] shall process the permit application." 40 C.F.R. 233.50(j). Because the "state-only" permit issued by the DEQ in this case did not conform to the objections previously expressed by EPA, the effect of the regulations was that permitting authority was transferred to the Corps by operation of law. Indeed, the DEQ permit itself made clear that it did not authorize work under

the CWA, see C.A. App. 123; Pet. App. 27a; pp. 7-8, *supra*, and the accompanying cover letter indicated that petitioner could "seek federal authorization for the project directly from the U.S. Army Corps of Engineers," C.A. App. 173. And in any event, the application to these unusual circumstances of a regulatory scheme that currently affects only two States (Michigan and New Jersey, see p. 4, *supra*) presents no issue of widespread or recurring importance.

4. The petition repeatedly suggests that EPA engaged in manipulative conduct in an effort to prevent petitioner from asserting its rights under state law. See, *e.g.*, Pet. 18 ("The agency's machinations scuttled [petitioner's] administrative appeal and takings action and forced the company to start the Section 404 process all over again."). The record does not support that assertion. Indeed, EPA had no apparent motive (legitimate or otherwise) for bringing the state administrative appeal to a halt.

As the district court explained,

> [petitioner's] administrative appeal under [state law] is an effort to change the limitations and conditions of the draft permit. If [petitioner] is successful in the administrative appeal, the end result will be a recommendation to the director of [the DEQ]. If the director accepts any changes recommended through the administrative proceeding, the permit which issued will contain different limitations and conditions than those to which EPA consented. Effectively, [petitioner] will not have a valid permit because EPA did not * * * approve it. The refusal to sign the draft permit vitiated the EPA's consent.

Pet. App. 4a-5a. Thus, if the state administrative appeal process had culminated in a decision favorable to

petitioner, EPA's earlier conditional withdrawal of objections to the March 1995 proposed permit would not have required the agency to accede to the State's issuance of a substantively different permit. As the district court recognized (*id.* at 16a-17a), the fact that Michigan's permitting process includes an administrative appeal mechanism does not alter the directive contained in 40 C.F.R. 233.50(j) that if the State ultimately fails either to satisfy EPA's objections or to deny the permit, authority to process the permit is transferred to the Corps.

There is also no basis for petitioner's repeated assertions (see, *e.g.*, Pet. 9-10) that the responsible federal and state agencies colluded to subject petitioner to an unfair result. The DEQ's reasons for granting a broad "state-only" permit are not altogether clear. The district court suggested that the State had "tak[en] a guarded approach to [petitioner's] takings action" because it had "recently suffer[ed] a huge verdict against it in a takings case." Pet. App. 16a. DEQ's issuance of the "state-only" permit had the effect, and perhaps the purpose, of reducing the State's potential exposure to takings liability by making clear that the federal government posed the only barrier to petitioner's proposed peat-mining activities. See *United States* v. *Bay-Houston Towing Co.*, No. 98-73252, 2002 WL 537630, at *30 (E.D. Mich. Mar. 13, 2002) (noting "the acute concerns in DEQ over the taking action in the Court of Claims and the desire of DEQ to issue a state permit to obviate any claim against the State of Michigan for a taking"). But whatever the reasons for the State's decision, the Corps' assertion of permitting authority was a reasonable response, and one consistent with the applicable provisions of the statutory and regulatory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1384

IN THE

Supreme Court of the United States

MICHIGAN PEAT, A DIVISION OF BAY-HOUSTON TOWING COMPANY, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF AUTHORITIES

Page

CASES:

Carter v. *United States*, 530 U.S. 255 (2000) 5

Eastern Associated Coal Corp. v. *United Mine Workers*, 531 U.S. 57 (2000) 5

Friends of Crystal River v. *EPA*, 35 F.3d 1073 (6th Cir. 1994) 2

New York v. *United States*, 505 U.S. 144 (1992) 5

Public Interest Research Group of N.J., Inc. v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) 4

Sims v. *Apfel*, 530 U.S. 103 (2000) 5

United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 2

REGULATION:

40 C.F.R. § 233.50(j) 2

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REPLY BRIEF FOR PETITIONER[1]

The Environmental Protection Agency failed to adhere to the statute and its own regulations governing the Clean Water Act permitting process. The agency did not follow those controlling rules when it directed the State of Michigan to return authority over Michigan Peat's Clean Water Act permit application to the Army Corps of Engineers. The Sixth Circuit's decision, which countenanced the EPA's

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[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

unauthorized power play, is flatly contrary to controlling Supreme Court precedent and the decisions of its sister circuits. The court's decision threatens the careful balance struck by numerous federal-state cooperative regulatory regimes, and it should be reversed.

1. Respondents spend the first several pages of their opposition setting forth the Clean Water Act's detailed statutory and administrative permitting scheme. Opp. 2-5. And as respondents duly observe, that detailed program provides for the EPA to reenter a state's federally approved permitting process only at certain times and in certain circumstances. *See Friends of Crystal River* v. *EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994) (noting that EPA retains only "[l]imited * * * oversight authority" over Michigan's Section 404 program). The regulations direct that if within 90 days of receiving EPA's objections to a proposed permit, the State Director "*neither* satisfies EPA's objections * * * *nor* denies the permit," *then* the Secretary of the Army, on behalf of the Corps of Engineers, "shall process the permit application." 40 C.F.R. § 233.50(j) (emphases added). Those are the only two triggering events that allow the Corps of Engineers to seize control of an individual permit application.

Respondents recognize as much. *See* Opp. 3-4. They also acknowledge that Michigan DEQ had satisfied the EPA's objections to the proposed permit in 1995; that EPA had subsequently *withdrawn* its objections; and that DEQ had issued a permit conforming with EPA's specifications. *See id.* at 5-6; Pet. App. 16a. With that, EPA's role in the permit process was complete—as the Sixth Circuit recognized in its earlier decision on Michigan Peat's first appeal. *See* Pet. App. 30a. The agency's subsequent action—two years later—divesting the State of authority over Michigan Peat's permit process was entirely outside the scope of its regulations. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (government agencies must obey controlling procedural rules); Pet. 14-22 (citing cases).

Respondents contend, however, that EPA's action in this case was lawful because the 1995 permit was never "final," since Michigan Peat appealed the permit's conditions. Opp. 8, 14-15. That is wrong for two reasons. First, the pertinent question is not at what point the permit was "final"; it is whether the regulations grant EPA any further role in the permit process once the agency approves a permit's conditions. The regulations plainly do not.

Second, as the Sixth Circuit correctly recognized in its decision on Michigan Peat's first appeal, "if Michigan Peat [had] sign[ed] the permit it would have waived" the appellate remedies expressly granted by the State's federally approved Clean Water Act permit program. Pet. App. 30a. Michigan Peat's decision to pursue the administrative remedies to which it was entitled did not give the EPA license to force Michigan Peat to start the permit process all over again with the Corps of Engineers. The EPA's argument would put permittees in an intolerable situation; they could either accept onerous permit conditions and forgo their right to an administrative appeal, or they could pursue an appeal that EPA could abort at any time, forcing permittees to start from square one with the federal government. Nothing in the regulations countenances that Catch-22.

Respondents also argue that Michigan's "state-only" permit—which the State issued in collaboration with the EPA,[2] without any permit application pending, and while Michigan Peat was pursuing its administrative appeal—constituted a "second permit decision" triggering agency review. Opp. 12-13. That simply begs the question presented in this petition: whether it is proper, after a final permit satisfying EPA's objections has issued and is on administrative appeal, for EPA to cut that process short by soliciting from the State,

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[2] Respondents take issue with Michigan Peat's characterization of EPA's close collaboration with the State. Opp. 14. The agency actively participated in developing the "state-only" permit stratagem, as the record makes clear. *See* Pet. 9-10.

and then objecting to, a phony "state-only" second permit that expressly disclaims any effect under the Clean Water Act.

3. Respondents also argue that Michigan Peat failed to present below the argument it makes now. Opp. 14. That is not so. In its Sixth Circuit brief, Michigan Peat repeatedly argued that the EPA's return of authority over Michigan Peat's Section 404 permit to the Corps of Engineers was unlawful because it occurred outside Michigan's Section 404 permit and administrative appeal process. Michigan Peat expressly argued to the court of appeals that the EPA's action had unlawfully "undone the 1995 final § 404 permit decision" and had "rendered the administrative review process a nullity." *See Michigan Peat* v. *United States EPA*, No. 01-1154 (6th Cir.), Appellant's Br. 21. Michigan Peat likewise argued that the agency's action denied it the process to which it was entitled under the Section 404 permit program. *See id.* at 29, 30-31. And Michigan Peat pointed out (*id.* at 30) that the District Court's decision approving the transfer of authority to the Corps of Engineers conflicted with the decision of the Third Circuit in *Public Interest Research Group of New Jersey, Inc.* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 78 (3d Cir. 1990)—a conflict that, as Michigan Peat observed in its petition, has now ripened into a square conflict between the courts of appeal. *See* Pet. 22-23.

In its rehearing petition, Michigan Peat reiterated that "transfer of permit jurisdiction occurs by operation of law, not by choice of the executive agencies," and that the EPA's action vesting the Corps of Engineers with authority over Michigan Peat's permit application was an unlawful end-run around Michigan's "due process mechanism for permit contests" under the State's federally approved Section 404 program. Pet. Reh. 9, 11. The issue presented here was quite plainly, and more than once, pressed before the Sixth Circuit below.

Respondents also suggest that because the Sixth Circuit affirmed the District Court without fully airing the issues in a published opinion, this Court should not grant the petition. *See* Opp. 12. But this Court routinely grants certiorari in cases where the circuit court has provided no analysis to justify its decision beyond the reasoning employed by the district court. *See, e.g., Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000) (issuing merits decision after Fourth Circuit had summarily affirmed the district court); *Carter* v. *United States*, 530 U.S. 255, 260 (2000) (issuing merits decision after Third Circuit had affirmed the district court in a summary unpublished opinion); *see also Sims* v. *Apfel*, 530 U.S. 103, 105-106 (2000) (reversing summary Fifth Circuit decision).

4. Finally, respondents barely muster a response to our argument that the effect of the Sixth Circuit's aberrant ruling will be widespread. Respondents argue that this case "presents no issue of widespread or recurring importance" because only two states currently operate federally approved Clean Water Act permitting programs. Opp. 16. But this Court itself has recognized that there are "*numerous* federal statutory schemes" that foster cooperation between federal and state entities and that allow states to operate regulatory programs with limited federal oversight. *See New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (citing statutes and cases) (emphasis added). Those programs work—and they are becoming increasingly popular—exactly *because* the federal government's role is circumscribed; once a State's program is found to pass muster, the State has primary authority over its program, with only carefully delineated exceptions. The EPA's action here undercut that crucial balance, and the Sixth Circuit's decision condoning EPA's action paves the way for other federal agencies cooperating in state-administered permitting programs to freely disregard their controlling rules as well.

* * * *

For the foregoing reasons, as well as those set forth in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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